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: R.V.

Date of Birth: [redacted]

Date of Hearing: April 18, 2011

CLOSED HEARING

ODR No. **1544-1011AS**

Parties to the Hearing:	Representative:
Parent[s]	Pro Se
Quaker Valley School District 100 Leetsdale Industrial Drive Leetsdale, PA 15056	Donald Palmer, Esquire 1424 Frick Building 437 Grant Street Pittsburgh, PA 15219

Date Record Closed:	April 25, 2011
Date of Decision:	May 10, 2011
Hearing Officer:	Cathy A. Skidmore, M.Ed., J.D.

INTRODUCTION AND PROCEDURAL HISTORY

Student[1] is an elementary-school aged student who was eligible for special education services under the Individuals with Disabilities Education Act (IDEA)[2] for the time period in question. Student's Parents filed a due process complaint against the above-named school district (hereafter "District") claiming that it denied Student a free, appropriate public education (FAPE) in March and April 2009.

Prior to the hearing, this hearing officer issued a ruling with respect to several requested subpoenas which clarified that the hearing would be limited to the issue presented in the Due Process Complaint, namely whether Student was denied FAPE for a 28-day period beginning on March 8, 2009.[3] A hearing convened in a single session, at which both parties presented evidence in support of their respective positions. For the reasons which follow, I find in favor of the Parents for a portion of the time period claimed.

ISSUES

1. Whether Student was denied a free, appropriate public education by the District for all or any part of the 28-day time period beginning on March 8, 2009; and

2. If so, is Student entitled to compensatory education and in what amount?

FINDINGS OF FACT

1. Student was and is an elementary-school aged student who, during the relevant time period, was eligible for special education as a child with developmental delay and a speech/language impairment. (Notes of Testimony (N.T.) 28, 43; Parent Exhibit (P) 5, P 6; School District Exhibit (S) 11)

2. Student and Student's family resided in the District at the residence of Student's grandparents at the beginning of the 2008-09 school year. Student had an Individualized Education Program (IEP) for the 2008-09 school year which provided for 30 minutes of speech/language services and 30 minutes of occupational therapy each week. As a program modification/item of specially designed instruction, Student was also provided with up to 30 minutes per week of small group instruction for articulation and language practice. (N.T. 29, 49-51, 118-19; P 5, P 6; S 11)

[1] Student's name and gender are not used in this decision to protect Student's privacy.
[2] 20 U.S.C. §§ 1400 *et seq.*
[3] *See* Hearing Officer Exhibit (HO) 1.

3. Student attended school in the District until October 2008, at which time the family relocated to another state. They returned to Pennsylvania at the end of February 2009. (N.T. 29, 49-51)

4. When the family returned to Pennsylvania, they stayed in a hotel in a neighboring township on a temporary basis due to hardship. Student's Parents[4] filled out the necessary paperwork to enroll Student back into the District on March 18, 2009. (N.T. 31, 51-53, 105; P 7, S 2)

5. The address listed on Student's enrollment paperwork on March 18, 2009 was the grandparents' address. (N.T. 106; P 1; S 2)

6. The District asked the Parents to have a new Certification of Residency completed since the family had moved out of the District. The Parents did not provide that requested document in March 2009. (N.T. 82-84, 88, 110-11)

7. Student's Parents explained to the District that they were staying in a hotel and that the children were homeless pursuant to the McKinney-Vento Homeless Education Assistance Improvements Act of 2001.[5] (N.T. 34-35)

8. Student and Student's siblings were not enrolled in the school district where the hotel was located. (N.T. 112)

9. The District sought advice from the local Intermediate Unit and the state Department of Education on enrolling Student and Student's siblings. (N.T. 111-12, 114-17)

10. The family had plans to move into a house within the District soon after returning to Pennsylvania. (N.T. 53, 58-59)

11. Student's Parents filed a complaint with the Department of Education on April 1, 2009, asserting the children's right to enroll in the District pursuant to the McKinney-Vento Act. (N.T. 35-36, 117)

12. During the 2008-09 school year, the District was on spring break over the week of April 6, 2009. The Parents did ask the District to provide work for Student and Student's siblings for that period, but none was provided. (N.T. 109; S 4)

13. The Parents retained counsel who communicated with counsel for the District. Student was permitted to attend school in the District beginning on April 16, 2009, and the District implemented Student's existing IEP at that time. (N.T. 36-38, 66, 118, 122, 141-42; P 2, P 3, P 4; S 9)

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[4] This hearing officer recognizes that Student's mother was the more active participant in Student's education, but will use the term "Parents" where it appears she was acting on behalf of both Parents.
[5] 42 U.S.C. §§ 11431-11435.

14. The following exhibits were admitted into the record:

    Parent Exhibit Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9

    School District Exhibit Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11

    Hearing Officer Exhibit Nos. 1, 2

    (N.T. 158)

DISCUSSION AND CONCLUSIONS OF LAW

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);[6] *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 are also charged with the responsibility of making credibility determinations of the witnesses who testify. *See generally David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009). This hearing officer generally found the witnesses to be credible, and the inconsistencies in the testimony did not necessarily relate to facts which were material to the decision in this matter. Credibility of witnesses is discussed as necessary in this decision.

The IDEA requires the states to provide a "free appropriate public education" (FAPE) to all students who qualify for special education services. 20 U.S.C. §1412. In *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court held that this 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 Board of Education v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999).

In this case, the record is clear that Student was entitled to special education services as specified in Student's then-current IEP. (Finding of Fact (FF) 2) The Parents attempted to re-enroll Student into the District on March 18, 2009. (FF 4) Student was not permitted entry into the District's school until April 16, 2009. (FF 13)

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[6] The burden of production, "*i.e.,* which party bears the obligation to come forward with the evidence at different points in the proceeding," *Schaffer*, 546 U.S. at 56, relates to the order of presentation of the evidence.

The Parents asserted that Student was entitled to be enrolled in the District in March 2009 pursuant to the McKinney-Vento Homeless Education Assistance Improvements Act of 2001. The District contended that Student and Student's siblings should have been enrolled in the school district where the hotel in which the family was staying was located. The decision in this case, thus, turns on whether Student should have been enrolled back into the District sometime prior to April 16, 2009.

The McKinney-Vento Act defines "homeless children and youths," in relevant part, as "individuals who lack a fixed, regular, and adequate nighttime residence," and includes

> children and youths who are sharing the housing of other persons due to loss of housing, economic hardship, or a similar reason; **are living in motels, hotels**, trailer parks, or camping grounds due to the lack of alternative adequate accommodations; are living in emergency or transitional shelters; are abandoned in hospitals; or are awaiting foster care placement[.]

42 U.S.C.A. § 11434a(2) (emphasis added). With respect to educating homeless children and youths, the McKinney-Vento Act further provides:

> (3) Local educational agency requirements
>
> (A) In general
>
> The local educational agency serving each child or youth to be assisted under this part shall, according to the child's or youth's best interest--
>
> (i) continue the child's or youth's education in the school of origin for the duration of homelessness--
>
> (I) in any case in which a family becomes homeless between academic years or during an academic year; or
>
> (II) for the remainder of the academic year, if the child or youth becomes permanently housed during an academic year; or
>
> (ii) enroll the child or youth in any public school that nonhomeless students who live in the attendance area in which the child or youth is actually living are eligible to attend.
>
> (B) Best interest
>
> In determining the best interest of the child or youth under subparagraph (A), the local educational agency shall--

(i) to the extent feasible, keep a homeless child or youth in the school of origin, except when doing so is contrary to the wishes of the child's or youth's parent or guardian;

(ii) provide a written explanation, including a statement regarding the right to appeal under subparagraph (E), to the homeless child's or youth's parent or guardian, if the local educational agency sends such child or youth to a school other than the school of origin or a school requested by the parent or guardian; and

(iii) in the case of an unaccompanied youth, ensure that the homeless liaison designated under paragraph (1)(J)(ii) assists in placement or enrollment decisions under this subparagraph, considers the views of such unaccompanied youth, and provides notice to such youth of the right to appeal under subparagraph (E).

(C) Enrollment

(i) The school selected in accordance with this paragraph shall **immediately** enroll the homeless child or youth, even if the child or youth is unable to produce records normally required for enrollment, such as previous academic records, medical records, proof of residency, or other documentation.

(ii) The enrolling school shall immediately contact the school last attended by the child or youth to obtain relevant academic and other records.

(iii) If the child or youth needs to obtain immunizations, or immunization or medical records, the enrolling school shall immediately refer the parent or guardian of the child or youth to the local educational agency liaison designated under paragraph (1)(J)(ii), who shall assist in obtaining necessary immunizations, or immunization or medical records, in accordance with subparagraph (D).

42 U.S.C.A. § 11432(g)(3) (emphasis added).

Although the procedural posture is quite different, the facts in this case are not critically distinguishable from those in *L.R. v. Steelton-Highspire School District*, 2010 WL 1433146 (M.D. Pa. 2010). There, the student was enrolled in the school district in 2003. The student was eligible for special education services, and the home school district implemented an IEP for the student until January 2009, when the student and his family were forced to move because their home was destroyed. The family stayed with relatives in another city but planned to move back to the home school district as soon as they were able. Despite recognizing the student as homeless pursuant to the McKinney-Vento Act, the home school district ultimately refused to enroll the student in its schools and informed the family that the student should be enrolled in the city where the family was staying.

The case proceeded to the stage where a preliminary injunction was sought. The District Court emphasized that the fact that the student was missing school was troublesome enough, but the additional fact that the student required special education was even more so. Further, it found it critical that the home school district had "in-depth knowledge" of the student and had previously been meeting the student's educational needs, and that the family had expressed an "unequivocal" intention to return to the home school district. *Id.* at *4. The Court explained that, "to permit [the student] to remain in the [city] only to eventually have him transferred back to the [home school district] once he and his grandmother are permanently housed" had the potential to cause irreparable harm to the student, "and would be completely contrary to the [McKinney-Vento] Act's express purpose of continuity of education for homeless students." *Id.*

In the instant matter, this hearing officer cannot conclude that the fact that Student and Student's family moved to an intervening school district before returning to the District makes any meaningful difference. The family moved to another state for only a few months before returning to the area. (FF 3) The family intended to find permanent housing in the District, and attempted to re-enroll Student in the District upon their return. (FF 4, 10) Student had previously, and at that time very recently, been provided with special education pursuant to an IEP in the District which was familiar with Student and Student's educational needs. (FF 2, 3) To require Student to be enrolled in a new school district on a temporary basis would, as in *L.R.*, frustrate the purpose of continuity in the Act, as well as defy common sense. Requiring Student to undergo successive transitions and changes in educational programming in a short period of time certainly was not in Student's best interest.

The family attempted to re-enroll Student on March 18, 2009 pursuant to the McKinney-Vento Act. (FF 4, 7) In order to "immediately" enroll Student, the District should have permitted Student entry the very next day, or on March 19, 2009. This hearing officer further concludes that the fact that the District may have been advised that it need not enroll Student in March 2009 is not determinative of whether it denied FAPE to Student during the time period in question. Additionally, even if the District Director of Pupil Services did not recall that the Parents referred to the McKinney-Vento Act immediately upon seeking to enroll Student and Student's siblings in March 2009 (N.T. 124), this hearing officer found the testimony of the Parents to be credible on this issue (FF 7).

Having found a denial of FAPE, the next issue is what relief may be awarded. It is well settled that compensatory education is an appropriate remedy where a school district knows, or should know, that a child's educational program is not appropriate or that he or she is receiving only trivial educational benefit, and the district fails to remedy the problem. *M.C. v. Central Regional School District*, 81 F.3d 389 (3d Cir. 1996). Such an award compensates the child for the period of time of deprivation of special education services, excluding the time reasonably required for a school district to correct the deficiency. *Id.*[7] In other words, "the amount of

[7] In addition to this "hour for hour" approach, some courts have endorsed a scheme that awards the "amount of compensatory education reasonably calculated to bring him to the position that he would have occupied but for the school district's failure to provide a FAPE." *B.C. v. Penn Manor School District*, 906 A.2d 642, 650-51 (Pa. Commw. 2006) (awarding compensatory education in a case involving a gifted student); *see also Ferren C. v. School District of Philadelphia*, 612 F.3d 712, 718 (3d Cir. 2010) (quoting

compensatory education is calculated by finding the period of deprivation of special education services and excluding the time reasonably required for the school district to rectify the problem." *Breanne C. v. Southern York County School District*, 732 F.Supp.2d 474, 487 (M.D. Pa. 2010). Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

At the time the Parents attempted to re-enroll Student into the District, Student was entitled to 1.5 hours of special education services each week. (FF 2) Ninety minutes per week divided by five days equates to eighteen minutes, or rounded up to approximately twenty minutes, of special education services each school day. Because the District already had an IEP for Student that had recently been implemented, this hearing officer concludes there is no need for a period of reasonable rectification. Accordingly, Student will be awarded twenty minutes of compensatory education for each day that school was in session from March 19, 2009 until April 16, 2009 when Student was re-enrolled into the District.

The hours of compensatory education are subject to the following conditions and limitations. Student's Parents may decide how the hours of compensatory education are spent. The compensatory education may take the form of any appropriate developmental, remedial or enriching educational service, product or device that addresses Student's educational needs. The compensatory education shall be in addition to, and shall not be used to supplant, educational and related services that should appropriately be provided by the District through Student's IEP to assure meaningful educational progress. There are financial limits on the parents' discretion in selecting the compensatory education. The costs to the District of providing the awarded hours of compensatory education must not exceed the full cost of the services that were denied. Full costs are the hourly salaries and fringe benefits that would have been paid to the District professionals who provided services to the student during the period of the denial of FAPE.

Lastly, it is clear that the Parents sought relief above and beyond the special education services to which Student was entitled for the time period in question. As noted above, compensatory education is limited to the denial of special education services.[8] The decision in this case does not preclude the parties from seeking any available additional relief in an appropriate forum.

Reid v. District of Columbia, 401 F.3d 516, 518 (D.C.Cir.2005) (explaining that compensatory education "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA.")). Given the brief time period at issue, and the lack of evidence from which to determine what position Student would have been in absent the denial of FAPE, this hearing officer will apply the *M.C.* standard.

[8] It also merits mention that any discussions related to settlement of the claims presented is not controlling of, nor relevant to, this decision.

CONCLUSION

The District denied FAPE to Student from March 19, 2009 through April 15, 2009, and Student is entitled to compensatory education for the deprivation of special education services not provided.

ORDER

1. The District did not provide FAPE to Student, and Student is entitled to twenty minutes of compensatory education for each day that school was in session from March 19, 2009 through and including April 15, 2009.
2. The compensatory education hours are subject to the conditions and limitations set forth above.

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: May 10, 2011