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
DUE PROCESS HEARING

Name of Student: M.L.
ODR #17597 / 15-16 KE

Date of Birth:
[redacted]

Date of Hearing:
May 18, 2016

CLOSED HEARING

Parties to the Hearing: Parent[s]	Representative: David Arnold, Esquire 920 Matsonford Road Suite 106 West Conshohocken, PA 19428
Lower Merion School District 301 E. Montgomery Avenue Ardmore, PA 19003	Amy Brooks, Esquire Wisler, Pearlstine, Talone, Craig, Garrity & Potash Blue Bell Executive Campus 460 Norristown Road, Suite 110 Blue Bell, Pennsylvania 19422-2323
Date Record Closed:	June 1, 2016
Date of Decision:	June 4, 2016
Hearing Officer:	Linda M. Valentini, Psy.D., CHO Certified Hearing Official

Background

Student[1] is a post-21-year old individual, multiply-handicapped since birth, who previously attended school in the District and at all times relevant hereto was entitled to special education programming pursuant to the Individuals with Disabilities Education Act [IDEA][2] and Pennsylvania Chapter 14 under the classifications of Orthopedic Impairment and Visual Impairment. Although eligibility under the IDEA has ended, Student remains a qualified handicapped person under §504 of the Rehabilitation Act of 1973 (29 U.S.C. §794)[3] and Chapter 15 of the Pennsylvania Code.

Pursuant to an incident, Student stopped attending classes and received homebound instruction. The Student and the Parent (hereinafter Family) asked for this hearing seeking compensatory education, alleging that the District denied Student a free, appropriate public education (FAPE) through a delay in starting the homebound instruction, and failing to provide Student's related services. The District argues that Student was initially unavailable for instruction, and later was able to come to the high school for instruction where all the services in the IEP would be offered.

The testimony of every witness, the content of each exhibit, and the parties' written closing arguments were reviewed and carefully considered in preparing this decision, regardless of whether there is a citation to particular testimony of a witness or to an exhibit. For the reasons put forth below I find in favor of the Family in part and the District in part.

Issues

1. Is the District required to provide compensatory education and IEP services when said services were made available at the school and through tutoring at home, and Student was beyond the age of compulsory education?

2. Did the Family fail to provide adequate documentation of the need for homebound instruction, and if so does said failure to provide documentation bar relief?

3. If the District is required to provide compensatory education and IEP services and did not, is Student entitled to compensatory education?

4. If Student is entitled to compensatory education, in which form and in what amount is Student so entitled?

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[1] During the time period giving rise to the due process complaint, the subject of the hearing was a student enrolled in the District. Therefore, this decision references the individual as "Student". However, as the individual had reached adulthood when the complaint was filed the decision references the Family (Student and Parent) except when a specific reference is made to the Student or the Parent. This decision is written without reference to the Student's name or gender, and as far as is possible, other singular characteristics have been removed to provide privacy.

[2] 20 U.S.C. §§ 1400-1482.

[3] 29 U.S.C. § 794.

Stipulation

For purposes of this hearing and this hearing only, not to bind a party in any subsequent proceeding, there may be references to an incident that happened on October 16, 2014 and there may be references to injuries that stemmed from it. That testimony is for this hearing and this hearing only. The parties can contest those issues at another time if they so desire. [NT 13-14]

Findings of Fact

1. Student is a life-long resident of the District and enrolled in the District as of Kindergarten. [NT 25-26; S-2]

2. Student was eligible for special education services under the category of Orthopedic Impairment (cerebral palsy) and Visual Impairment throughout the time Student was enrolled in the District. [NT 26-27; S-21]

3. Student graduated from a District high school on June 9, 2015. [NT 25-26, 119; S-18]

4. Prior to the incident in October 2014 there were times when Student missed school for extended periods. [NT 27]

5. The District provided Student with home tutoring during those times. [NT 27]

6. Student attended classes at the high school at the beginning of the 2014-2015 school year. [NT 28]

7. Following an incident, Student did not attend the high school after October 16, 2014. [NT 28, 66-67, 115-116]

8. Student takes oxycodone for pain every four hours when awake. Because Student has been taking this medication since 2009 Student does not find that Student's memory or other mental functioning is impaired and Student is not aware of experiencing any side effects. Student is treated for pain by a psychiatrist with a subspecialty in pain management. [NT 28-29, 34-35, 45, 93-94 109-111; P-23]

9. Depending on the day and how Student is feeling Student may or may not be able to get out of bed. [NT 48, 67]

10. Student can do math problems mentally and can listen to instruction while in bed. In order to use the computer Student needs to get out of bed. [NT 42-43, 48, 154]

11. In early November 2014 Student reached out by email to the Director of Services and Special Education asking her to send tutors into the home. [NT 153]

12. Student and Parent attended an IEP meeting by telephone on November 13, 2014. At the meeting Student told the school that it was very difficult to get out of bed and to perform the tasks of daily living. Student indicated to the District that Student wanted to be tutored at home. [NT 42, 44-46, 53]

13. On November 10, 2014 the physician managing Student's pain wrote a letter to the effect that she had instructed Student to remain at home and receive tutoring until existing hardware in Student's spine could be evaluated. She based this on telephone contact with Student rather than physically examining Student. The Family's counsel forwarded the letter by email to District's counsel on November 18, 2014. [NT 95, 105, 114; S-9, P-21]

14. On November 17, 2014 Student's orthopedic physician's assistant wrote a brief note asking that Student receive tutoring due to Student's experiencing pain and being unable to participate in activities at school. On December 17, 2014 the Family's counsel provided the note to District's counsel by email, indicating that Student had an orthopedic appointment on December 25, 2014. [S-10]

15. The District wanted the Family to provide additional information, specifically the form required for students to receive homebound instruction. The Family did not have a physician complete the form and the District did not send the form directly to the pain management physician or the orthopedic physician for completion. The extent of the District's follow-up with the Family or the Family's counsel in this regard is unclear. The District never received the completed form. [NT 155-161, 166-168, 170-171; S-16]

16. In the absence of such information the District assumed Student could return to the high school and receive the full services listed in the IEP. [NT 156-158]

17. Although the District intended for the IEP to be implemented in the high school, because the Family requested tutoring in the home, and so that Student would meet graduation requirements, starting on January 7, 2015 the District provided Student with homebound instruction weekly in math, English, and history (theology and modern culture). Starting on March 5, 2015 the District provided homebound instruction weekly in science (meteorology). [NT 29, 116-117, 119, 135, 158; P-11, P-14]

18. The tutors provided the services in conformity with the allotted hours except when the Family had to cancel the sessions. [NT 53-54]

19. The tutors implemented SDIs in the IEP as appropriate: Direct and explicit feedback when speech is not understood; extra wait time to process information; use of white board, graph paper, near distance magnification device; extended time on assignments; option to type answers on computer; directions orally and in writing; availability of computer with the Kurzweil program; naturally breaking down long-term assignments into smaller manageable pieces via one-to-one instruction and pacing; access to a near and distance viewing device; additional time for visual processing; reading material clear and uncluttered; limiting visual clutter; controlling glare; color coding, highlighting information; materials presented upright; sending materials electronically; instructional

lessons provided in multimodal method; support with advocacy with academic and self-care tasks; breaks provided as needed. [NT 136-139]

20. The District's technology specialist provided Student with computer assistance during the time Student was not attending school. [NT 48-51; S-20]

21. Between January 7, 2015 and the end of the school year the District did not provide Student with physical therapy, occupational therapy, speech therapy, vision therapy or adaptive physical education, all of which were in Student's IEP. [NT 31-32]

22. Student's relevant IEPs provided for physical therapy 4 times per month for 60 minutes per session; occupational therapy 4 times per month for 60 minutes per session; speech therapy 2 times per month for 30 minutes per session; vision therapy 2 times per month for 45 minutes per session; and, adaptive physical education a minimum of one 55-minute period per 4 day cycle. [P-6, P-9]

23. In the State of Pennsylvania, the Physical Therapist Practice Act requires a physical therapist to have a prescription to provide physical therapy, and that prescription should be updated every time there may be a change in medical condition. At the November 13, 2014 IEP meeting the physical therapist was present but could not recall with certainty if she told the Family that a new prescription was needed. IEP meeting notes do reference a prescription for physical therapy. The Family did not provide the District with a new prescription. [NT 76-81, 186-192; S-8]

24. Because Student could not attend school Student could not receive adaptive physical education. [NT 43]

25. The District convened an IEP meeting on January 30, 2015. A copy of the Invitation was sent by email to the Family's attorney. The Parent does not know if she received the Invitation by US mail. The special education teacher's log indicates that in a conversation on January 30th the Parent indicated having received the Invitation [how she received it is not in the record] and asking the purpose of the meeting. The Family and/or their attorney did not attend. [NT 82, 84, 86, 161-162, 178-181; S-11, S-22]

26. The special education teacher believes that the Parent was absolutely clear that Student could return to the District at any time, but the teacher received the impression that Student would not be returning. [NT 181-182; S-22]

27. The District offered Extended School Year (ESY) for summer 2015 but the Parent verbally declined and did not return the Notice of Recommended Educational Placement (NOREP). [NT 162, 169; S-23]

Legal Basis and Discussion

Burden of Proof: The burden of proof, generally, consists of two elements: the burden of production [which party presents its evidence first] and the burden of persuasion [which party's evidence outweighs the other party's evidence in the judgment of the fact finder, in this case the hearing officer]. The burden of persuasion lies with the party asking for the hearing. If the parties provide evidence that is equally balanced, or in "equipoise", then the party asking for the hearing cannot prevail, having failed to present weightier evidence than the other party. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006); *Ridley S.D. v. M.R.*, 680 F.3d 260 (3rd Cir. 2012). In this case therefore the Family asked for the hearing and thus bore the burden of proof.

Credibility: During a due process hearing the hearing officer is charged with the responsibility of judging the credibility of witnesses, weighing evidence and, accordingly, rendering a decision incorporating findings of fact, discussion and conclusions of law. Hearing officers have the plenary responsibility to make "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses". *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003); *see also* generally *David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009); *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). Although the Parent was experiencing difficulties with recall of certain facts, I did consider her testimony carefully. However, when her testimony was contradicted by the testimony of other witnesses or by documentary evidence I did not rely on her testimony. The physical therapist also had difficulty remembering a specific fact – whether or not she asked the Family for a prescription at the November 2014 IEP meeting – but I found her explanation for her inability to lawfully provide physical therapy without a prescription to be credible. Other than the above, I did not find any credibility issues with other witnesses.

FAPE: Special education issues are governed by the Individuals with Disabilities Education Improvement Act of 2004 ("IDEIA" or "IDEA 2004" or "IDEA"), which took effect on July 1, 2005, and amends the Individuals with Disabilities Education Act ("IDEA"). 20 U.S.C. § 1400 *et seq.* (as amended, 2004). "Special education' is defined as specially designed instruction…to meet the unique needs of a child with a disability. 'Specially designed instruction' means adapting, as appropriate to the needs of an eligible child …the content, methodology, or delivery of instruction to meet the unique needs of the child that result from the child's disability and to ensure access of the child to the general curriculum so that Student or she can meet the educational standards within the jurisdiction of the public agency that apply to all children. C.F.R. §300.26

In *Board of Educ. of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206-07, 102 S.Ct. 3034. 3051 (1982), the U.S. Supreme Court articulated for the first time the IDEA standard for ascertaining the appropriateness of a district's efforts to educate a student. It found that whether a district has met its IDEA obligation to a student is based upon whether "the individualized educational program developed through the Act's procedures is reasonably calculated to enable the child to receive educational benefits."

Benefits to the child must be 'meaningful'. Meaningful educational benefit must relate to the child's potential. *See T.R. v. Kingwood Township Board of Education*, 205 F.3d 572 (3rd Cir. 2000); *Ridgewood Bd. of Education v. N.E.*, 172 F.3d 238 (3rd Cir. 1999); *S.H. v. Newark*, 336 F.3d 260 (3rd Cir. 2003) (district must show that its proposed IEP will provide a child with meaningful educational benefit).

However, an LEA is not required to maximize a child's opportunity; it must provide a basic floor of opportunity. *See Lachman v. Illinois State Bd. of Educ., 852* F.2d 290 (7th Cir.), *cert. denied*, 488 U.S. 925 (1988). In a homespun and frequently paraphrased statement, the court in *Doe v. Tullahoma City Schools* accepted a School District's argument that it was only required to "...provide the educational equivalent of a serviceable Chevrolet to every handicapped student." and that "....the Board is not required to provide a Cadillac..." *Doe ex rel. Doe v. Bd. of Ed. of Tullahoma City Sch.*, 9 F.3d 455, 459-460 (6th Cir. 1993)

The Third Circuit has adopted this minimal standard for educational benefit, and has refined it to mean that more than "trivial" or "*de minimus*" benefit is required. *See Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 1179 (3d Cir. 1998), *cert. denied* 488 U.S. 1030 (1989). *See also Carlisle Area School v. Scott P.*, 62 F.3d 520, 533-34 (3d Cir. 1995), quoting *Rowley*, 458 U.S. at 201; (School districts "need not provide the optimal level of services, or even a level that would confirm additional benefits, since the IEP required by IDEA represents only a "basic floor of opportunity"). It is well-established that an eligible student is not entitled to the best possible program, to the type of program preferred by a parent, or to a guaranteed outcome in terms of a specific level of achievement, as noted in several recent federal district court decisions. *See, e.g., J. L. v. North Penn School District*, 2011 WL 601621 (E.D. Pa. 2011) Thus, what the statute guarantees is an "appropriate" education, "not one that provides everything that might be thought desirable by 'loving parents.'" *Tucker v. Bayshore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989).

Compensatory Education: Compensatory education is an appropriate remedy where an LEA knows, or should know, that a child's educational program is not appropriate or that he or she is receiving only a trivial educational benefit, and the LEA fails to remedy the problem. *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996); *Ridgewood Education v. N.E.*, 172 F.3d. 238, 250 (3d. Cir. 1999); *D.K. v. Abington School District*, 696 F.3d 233, 249 (3d Cir. 2012). *Ridgewood* provides that a school district has a reasonable period of time to rectify a known issue. Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990). Courts in Pennsylvania have recognized two methods for calculating the amount of compensatory education that should be awarded to remedy substantive denials of FAPE. Under the first method ("hour for hour"), which has for years been the standard, students may potentially receive one hour of compensatory education for each hour that FAPE was denied. *M.C. v. Central Regional.* An alternate, more recent method ("same position"), aims to bring the student up to the level where the student would be but for the denial of FAPE. *Reid ex rel.Reid v. District of Columbia*, 401 F.3d 516, 523 (D.D.C. 2005); *B.C. v. Penn Manor Sch. District*, 906 A.2d 642, 650-51 (Pa. Commw. 2006); *Jana K. v. Annville Cleona Sch. Dist.*, 2014 U.S. Dist. LEXIS 114414 (M.D. Pa. 2014);.*Ferren C. v. Sch. District of Philadelphia*, 612 F.3d 712, 718 (3d Cir. 2010)(quoting *Reid* that compensatory education "should aim to place disabled

children in the same position that they would have occupied but for the school district's violations of the IDEA."). The "same position" method has been recently endorsed by the Third Circuit in *G.L. v. Ligonier Valley Sch. Dist. Authority*, 115 LRP 45166, (3d Cir Sept. 22, 2015) although the court also cites to *M.C.*

The "same position" method, while essentially ideal, has significant practical problems in that unless the parents produce a credible expert to testify about what is needed to being the child up to the same position he or she would occupy but for the denial of FAPE the hearing officer is left with having to craft a remedy based on educated estimation. Although on several occasions this hearing officer has been able to do so with relative confidence, the instant matter does not present such an opportunity. Therefore the default "hour for hour" approach will be used.

Section 504: With respect to any Section 504 claims, the obligation to provide FAPE is substantively the same under Section 504 and under the IDEA. *Ridgewood*, *supra*, at 253; *see also Lower Merion School District v. Doe*, 878 A.2d 925 (Pa.Commw. 2005); P.P. v. West Chester Area School District, 585 F.3d 727 (3d Cir. 2009). Because all the Family's claims raised in these proceedings have been addressed pursuant to the IDEA, there need be no further discussion of any claims under Section 504.

Discussion

This hearing addresses whether the District provided Student with FAPE from October 17, 2014 through Student's graduation from the high school in June 2015.

As of October 17, 2014, Student stopped attending school in the high school building. By early November 2014 Student reached out by email to the Director of Services and Special Education asking her to send tutors into the home. At a November 13, 2014 IEP meeting which Student and Parent attended by telephone, Student indicated that pain prevented attendance at the high school but that Student was available for tutoring in the home.

Both Student's pain management physician and the orthopedist's office sent very brief letters to the effect that Student should receive tutoring in the home. The District received the first at least by November 18th and the second at least by December 17th respectively, although the Family may have provided them earlier. Given the paucity of information the physicians provided, the District required additional information, specifically a standard form to be submitted when a student requires homebound instruction. The form was not forthcoming.

Although the District did not receive the form required for homebound instruction, in order that Student would be able to graduate by age 21 the District initiated tutoring services in the home for math, English, and history by January 7, 2015 and started science on March 5, 2015. The District is to be commended for this action on Student's behalf.

In light of the earliest documented receipt of a physician's letter on November 18th, given Thanksgiving and the winter break, I find that the earliest date the District could reasonably have assigned staff and started tutoring was the first full school week in January 2015 following the winter break. That week began on January 5th; services began on January 7th. Provision of

science tutoring began two months later, a considerable delay. However, the tutoring services were provided in order that Student could graduate by the end of the school year in which Student turned 21. Student in fact did graduate even though coursework in science was delayed by two months. I therefore find that Student was not denied FAPE in the subject areas of math, English, history or science.

The Family also claims a denial of FAPE in the areas of word decoding and written expression as well as independent learning skills. Here, the Family failed to carry its burden of proof, having adduced no evidence that demonstrated that word decoding and written expression were not covered in English tutoring and, although I could not find a definition of 'independent learning skills' in the record, to the extent that this encompasses computer literacy and self-advocacy Student clearly demonstrated self-advocacy skills in communication with teachers and in testifying at the hearing. Furthermore, as above, Student successfully graduated. I therefore do not find a denial of FAPE in these regards.

The record is clear that Student did not receive the related services of physical therapy, occupational therapy, speech therapy, vision therapy or adaptive physical education, all of which were in Student's IEP. The State of Pennsylvania prohibits delivery of physical therapy services in any setting without a physician's prescription. It was the Family's responsibility to obtain the prescription from Student's orthopedist and the Family did not, rendering the physical therapist unable to provide this service. Given that Student was at home, adaptive physical education could not be provided. However, there are no reasons why occupational therapy, speech therapy, or vision therapy could not be provided, and the District admits that these were not provided. Therefore Student is entitled to compensatory education for these services on an hour-per-hour basis as noted in the IEP for the five months of January through May.

Section 504: With respect to any Section 504 claims, this hearing officer notes that the obligation to provide FAPE is substantively the same under Section 504 and under the IDEA. *Ridgewood*, *supra*, at 253; *see also Lower Merion School District v. Doe*, 878 A.2d 925 (Pa.Commw. 2005). Therefore, having reached all of the above conclusions with respect to the IDEA, the same determinations are made with respect to a denial of FAPE under Section 504. There is, therefore, no reason to address Section 504 separately.

ORDER

It is hereby ordered that:

1. Student was not denied FAPE in the areas of math, English, history or science.

2. Student was not denied FAPE in the areas of reading decoding, written expression or independent learning skills.

3. Student was not denied FAPE in the area of adaptive physical education.

4. Student was not denied FAPE in the area of physical therapy.

5. Student was denied FAPE in the areas of occupational therapy, speech therapy and vision therapy for a period of five (5) months.

6. Student is entitled to compensatory education under the IDEA as follows:
   a. Occupational Therapy: 20 hours [4 hours per month for 5 months]
   b. Speech Therapy: 5 hours [1 hour per month for 5 months]
   c. Vision Therapy: 7.5 hours [1.5 hours per month for 5 months]

7. As all appropriate relief has been ordered under the IDEA, all claims for relief under Section 504 are denied and dismissed.

8. Any claims not specifically addressed by this decision and order are denied and dismissed.

June 4, 2016
Date

Linda M. Valentini, Psy.D., CHO

Linda M. Valentini, Psy.D., CHO
Special Education Hearing Officer
NAHO Certified Hearing Official