

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.

Due Process Hearing

Student JM (#8557/07-08 AS)
Date of Birth: xx/xx/xx
Date of Hearing: April 8, May 12 & 16,
June 11 & 24, 2008
Closed Hearing

Parties to the Hearing

Parent
Ms.

Representative
Kelly A. Stepp, Esq.

Transcript Completed
July 11, 2008

Date of Decision
July 16, 2008

School District
Southeastern Greene

Representative
Barbara A. Rizzo, Esq.

Hearing Officer
David Y. K. Lee

II. BACKGROUND

Student is a teenage student who resides in the Southeastern Greene School District (hereafter District). Student began having significant adjustment difficulties, in the form of anxiety and depression, following the untimely death of Student's [family

member] when Student was in the sixth grade as a regular education student in the District. Student was provided with Homebound Instruction (hereafter Homebound) for seventh grade and the second half of eighth grade. Student completed ninth grade at the [redacted] School (hereafter School). Homebound was again instituted from November, 2006 to the end of Student's tenth grade year at School. For the current 2007-2008 school year, Student is enrolled in the [redacted] Charter School (hereafter Charter School). The parent opined that the District failed in its Child Find obligations and requested a due process hearing.

III. FINDINGS OF FACT

1. Student, whose date of birth is xx/xx/xx, resides in the District. (N.T. 850. P. #3 @ 1.)
2. In seventh grade, Student had a prescription for Homebound for the first nine weeks dated September 10, 2003. (P. #1 @ 24-25.)
3. A subsequent prescription dated January 8, 2004 was to continue Homebound for the remainder of the 2003-2004 school year. (P. #1 @ 17, P. #16.)
4. Student received As and Bs with the exception of Math which was a C for seventh grade. (P. #11 @ 8.)
5. Student started eighth grade at School and then received Homebound from December 8, 2004 to the end of the 2004-2005 school year. (P. #2 @ 1-6, P. #7.)
6. For eighth grade, Student received Cs in the major subjects of English, Math, and Physical Science. (P. #11 @ 8.)

7. Student attended School for ninth grade (2005-2006 school year) although Student was absent for 60 days with most of them as Medical Excuse absences. (P. #11 @ 8. P. #14 @ 3.)

8. For ninth grade, Student received Cs in English, History, General Art, and Ds in Integrated Math, and Science. (P. #11 @ 8.)

9. Student started tenth grade and then had a prescription for Homebound from October 30, 2006 to January 4, 2007, although the Homebound teacher did not start until February 26, 2007. (N.T. 137, 823-827. P. #2 @ 8.)

10. Homebound was continued for the remainder of the 2006-2007 tenth grade year. (P. #2 @ 8-12. P. #14 @ 6.)

11. For tenth grade, Student received five Fs, a C in Integrated Math, and a D in English. (P. #11 @ 8.)

12. The failing grades were due to Student not completing classroom assignments, mostly from the second marking period. (N.T. 524-528.)

13. Instead of having to repeat tenth grade, Student enrolled in the Charter School for the 2007-2008 school year. (N.T. 850.)

14. The parent obtained an independent psychological evaluation on November 3, 2007, which found Student to be an eligible student under the disability category of Other Health Impaired (hereafter OHI) and Specific Learning Disability (hereafter SLD) in Math. (N.T. 258. P. #10 @ 7.)

15. A Due Process Complaint Notice was received in the Office for Dispute Resolution on February 25, 2008. (ODR file.)

16. Due process hearing sessions were held on April 8, May 12 and 16, June 11 and 24, 2008.¹

IV. ISSUES

1. Did the District fail in its Child Find duties? (N.T. 47.)
2. Is Student entitled to compensatory education? (N.T. 47.)

V. DISCUSSION AND CONCLUSIONS OF LAW

Child Find

34 CFR §300.111(c)(1) includes those children in Child Find activities “...who are suspected of being a child with a disability under 300.8 and in need of special education, even though they are advancing from grade to grade”. In the instant matter, it is the parent’s contention that the District had reasons to suspect Student to be a student in need of evaluation for special education services given Student’s emotional difficulties and declining grades. (N.T. 714-716, 833-834.) With the emphasis on Student’s adjustment difficulties commencing in seventh grade subsequent to the [death] of [family member] (N.T. 852-853, 915.), the analysis on the issue of Child Find will therefore be focused on Student’s academic performance on record from seventh grade to the time of Student’s enrollment at the Charter School. This Hearing Officer notes that Student was not at any time considered to exhibit behavioral issues in school.

¹ The protracted time-line, especially toward the end, was partly contributed by the illness and hospitalization of a particular witness. (N.T. 769-770.) The parties elected to provide Closing Statements in writing. (N.T. 926-927.) Transcript of the last session was received on June 30, 2008. A two day extension of Parent’s Closing Statement was subsequently granted.

Student's difficulties were in the form of depression and anxiety subsequent to the trauma of Student's [loss of family member]. (N.T. 853, 856. P. #1 @ 26-32.)

The parent's Motion to present testimony by personnel from the Charter School was denied. (N.T. 316-324. H.O. #3.) The parent is of the opinion that the District should have provided Student with special education services since the Charter School is doing so having found Student to be in need of such. The inquiry of facts in the matter of Child Find is retrospective. The query before this Hearing Officer is whether or not the District had reason to believe or suspect over time, that Student might be a student in need of special education services. It is not whether or not Student is currently found to be in need of special education services by another educational entity. Since the District did not evaluate Student in accordance with 34 CFR §300.304 on evaluation procedures, the independent psychological evaluation report was received to provide some necessary data regarding Student's cognitive functioning. (N.T. 313-314.) The District's argument that an evaluation cannot be properly conducted by the District since Student no longer attends, and thus negates the issue of Child Find, is a circular one and cannot be sustained.

Homebound

Homebound is provided when a student is deemed not able to attend school according to a physician's instruction due to medical conditions. The instruction is often written on a prescription sheet with or without an accompanying District form.

Homebound is for a given period of time (three-calendar-months) which may be renewed or extended with a subsequent physician's instruction. In the instant case, Student was given a number of mental health diagnoses, including PTSD, Major

Depressive Disorder, Panic Disorder, Irritable Bowel Syndrome, for Student's inability to attend school by Student's treating psychiatrist. (N.T. 10-26. P. #1 & #2.) Homebound, therefore, is not a placement determined by an educational team nor is it an option under the continuum of alternative placements². It is reported separately to the Pennsylvania Department of Education for attendance and reimbursement purposes.³ The District is responsible to obtain a teacher to provide Homebound (five hours per week) for the period prescribed. The issue of Homebound in itself, and when not related to special education services, is not within the purview of this Hearing Officer.

2003-2004 school year

Student's adjustment difficulties began or become magnified following the untimely death of Student's [family member]. "I could not get Student to come out of Student's room... [redacted]. Student just would not come out of the house. Student withdrew from everything." (N.T. 79-83, 852-854.) Homebound was recommended shortly after the start of school with the illness given as "Major Depressive Disorder with PTSD due to acute grief process". (P. #1 @ 25.) As stated above, Homebound is instituted based on a medical condition or conditions opined by a health care provider. There is nothing in the IDEA under Child Find that indicates Student might be in need of special education services by virtue of the fact that Student was prescribed Homebound.

² See 34 CFR §300.115.

³ See PA Department of Education website for attendance reporting and reimbursement for Homebound students.

One of Student's adjustment difficulties was unequivocally described by Student's Parent as that of withdrawal and severe anxiety about [redacted]. (N.T. 853, 862, 864, 876-877, 896.)

Student completed the seventh grade year on Homebound and received reasonably good grades. (F.F. #4.) Student's lowest grade was a C in Math and Student's Homebound teacher had notations such as "difficulty remembering how to complete math homework", "difficulty remembering math concepts", and recommended that "Student practice and review Student's math through the summer". (N.T. 135, 145-146. P. #6 @ 11, 15, 19.) Homebound consisted of five hours of teacher contact per week and the Homebound teacher was working on materials from Student's seventh grade teachers. (N.T. 134-135, 150-151, 156.) A grade of C in Math, by itself, does not immediately indicate the need for a comprehensive psychoeducational evaluation or cause the District to suspect that Student might be in need of special education. Since Student was on Homebound for the whole year, Student did not have any standardized assessment results for screening purposes. The District also would not have been able to systematically gather observational data of Student's behavior and performance in the regular classroom setting.⁴ Even if Student was in school and if there were criterion referenced data regarding Math, intervention within the regular education curriculum would have been expected prior to the consideration of an evaluation as a thought-to-be exceptional student.

⁴ See 34 CFR §300.307-311.

The parent proposed that the Homebound was less than appropriate because the teacher was inexperienced and not certified in special education. (N.T. 131-132, 134, 151. P. Closing Statement @ 4.) Student did not have an Individualized Education Plan (hereafter IEP). Thus, specially designed instruction as well as IEP goals and objectives were not at issue. This Hearing Officer, also notes a contrary perspective from Student's Parent when they opined that the Homebound teacher was a "blessing" in that they were able to bring Student "out of Student's shell", and that Student "admired her". (N.T. 864-865.)

Therefore, the parent did not fulfill the burden of proof⁵ that Child Find obligations were violated for the 2003-2004 school year.

2004-2005 school year

At the end of eighth grade, there was a decline in grades compared to seventh grade. (F.F. #6.) The parent opined that the declining grades should have been a significant concern to warrant an evaluation for special education services. (N.T. 833.) Student attended eighth grade until December when Student again went on Homebound. (F.F. #5.) The Homebound reports, covering the period from December to the end of school, did not provide specific information regarding Student's progress, or the lack of, in Math (it remained a C as the final grade). (P. #11 @ 8.) Overall, the Homebound teacher remarked that Student needed to spend more time studying and completing homework. (N.T. 136, 157-159. P. #7 @ 1, 4, 10.)

⁵ See Schafer v. Weast, 546 U.S. 49 (2005).

Student was in school sporadically for the first part of eighth grade with six excused absences and 17 medical excused absences scattered over three months before December. (P. #14 @ 1.) Since grades do not decline only at the end of the school year, the District arguably should have available some curriculum based data to specifically identify areas of academic concern, if any, and accommodations in accordance with 34 CFR §300.305 on additional requirements for evaluations⁶. If there were standardized assessments of academic performance and observational data regarding manifestations of anxiety obtained when Student was not absent, such data were not in evidence. (N.T. 239-240.)

⁶ Current classroom-based, local, or State assessments, and class-room based observations. *id.* at (a)(1)(ii).

Given the inconsistent and short period of attendance, and even if the District had begun to gather preliminary data, the District would not have had the time to complete the screening⁷ process prior to evaluation in accordance with 22 PA Code §14.122. The District, therefore, is not found to be in violation of the Child Find mandate for the 2004-2005 school year.

2005-2006 school year

Student was not on Homebound for Student's ninth grade year. Although Student was absent for around 60 days, excused and otherwise, Student was in school for 120 days. (P. #14 @ 3.) Given the apparent difficulties Student had when Student was in school during the previous eighth grade year and in the absence of previous screening information, it is reasonable to expect the District to then obtain some curriculum based assessment to, at the least, identify Student's instructional levels in order to tease out some variables contributing to Student's decline in grades. Student had been demonstrating relative weakness in Math based on the differential in grades from seventh grade and the observations of Student's Homebound teacher. (N.T. 240. P. #11 @ 8.) Student did score Below Basic in Math on the PSSA taken in fifth grade. (N.T. 306, 711-713. P. #11 @ 3.) This Hearing Officer notes that the independent psychological evaluation conducted in November, 2007, found Student, as student in an advanced grade, not to be "successful with long division, complex fractions, decimals or

⁷ Among other procedures, the District shall "identify and provide initial screening for students prior to referral for a special education evaluation". *id.* at (a)(1).

basic algebra, [as well as making] computational errors in addition, subtraction and multiplication". (N.T. 257. P. #10 @ 5.)

Student had great difficulty going from Student's home to somewhere else. (N.T. 876-877, 917.) Although there was not much the District could do when Student was not in school, Student was, however, in school for two-thirds of the time. Student's teachers were notified of the need for accommodation due to Student's need to go to the restroom without much warning. (N.T. 396-401. P. #13.) There was no follow-up information regarding the frequency of such occurrences. (N.T. 305, 403-404.) Although the absence of any such accommodation is not in evidence, systematic observational data to identify antecedents of any manifested avoidance behavior could have been helpful to assist in determining the effect of manifested anxiety symptoms in Student's ability to learn. (N.T. 261-262, 266-267.) Additional accommodations might have been identified and provided to support Student when Student was in school within the regular education environment prior to the consideration of special education services. The apparent lack of involvement of the school psychologist and/or the guidance counselor⁸ is curious.

There is sufficient evidence on record to indicate that the District had reasons to start at least some initial screening which could have led to some intervention before the formal process of evaluation for special education services. It is, therefore, determined that the District was in violation of the Child Find mandate for the 2005-2006 school year.

⁸ The role of the guidance counselor, however, seems to be more in the area of record keeping. (N.T. 439.)

2006-2007 school year

Student began Student's tenth grade year at School before being prescribed Homebound again to begin on October 30, 2006, although Homebound did not actually begin until February 26, 2007. (N.T. 136-137, 806-807. P. #8. F.F. #9.) During the first two months of school, however, Student was absent with medical excuse for about 14 days. (P. #14 @ 5.) In spite of extensive questioning throughout the proceedings, it is not at all clear as to what happened to the prescription before it was located by the District's Superintendent on December 15, 2006. (N.T. 791-809. P. #2 @ 8.) There is sufficient indication to infer that it was in the possession of the District. (N.T. 872-875.) Even with the involvement of the school psychologist and the school social worker in meetings with regard to Student's difficulties in attending school, the District did not see the need to, at least, compile a comprehensive profile of Student. Testimony was confusing and contradictory as to who had what knowledge of Student and when such knowledge was known. (N.T. 333-338, 789-792, 827-828, 836-837.)

Although the provision of Homebound is not, in itself, an issue before this Hearing Officer, the lack of instruction would be a denial of a free appropriate public education (hereafter FAPE) if Student was then a student who had been determined to be in need of special education services. It is noted that Student did not return to school following the expiration of the Homebound prescription on April 10, 2007. (F.F. #10.) Matters became somewhat confusing since the Homebound teacher continued to see Student until May 30, 2007, and yet Student was marked as "un-excused absent". (P. #8 @ 7. P. #14 @ 6.) If it was an attempt for the District to make up for the time lost earlier in the school year, there was no apparent understanding or coordination of services since

Student was not given passing grades for tenth grade. (N.T. 178, 186-188, 213-214, 527-532, 892-893. F.F. #11.)

The parent was unequivocal that these proceedings would not have had to occur because Student would not have been retained if Homebound had been provided in a timely manner. (N.T. 918-919.) It is not within the jurisdiction of this Hearing Officer to determine the retention status of Student or to change any grades that were given. Student withdrew from the District and enrolled in the Charter School. (F.F. #12.) This Hearing Officer offers the observation that the Charter School, as does Homebound, provides a situation in which Student would not have to travel away from home every day. This is not to suggest that the parent or Student prefers the Charter School over Homebound, or vice versa.

The parent opined that Student's anxiety was exacerbated by Student's first period teacher who did not seem to accept the fact that Student is in need of accommodation for Student's anxiety symptoms. (N.T. 870, 894-899, 921.) In the absence of testimony to the contrary, the lack of sensitivity of the particular teacher is indeed unfortunate.

In conjunction with the failure of Child Find determination continued from the previous ninth grade year, the District is also found to have failed to provide the necessary accommodations for Student during the first two months of the 2006-2007 school year.

Compensatory education

Compensatory education is a remedy designed to provide eligible students with the services they should have received pursuant to a FAPE. Lester H. v. Gilhood, 916 F. 2d 865 (3rd Cir. 1990), *cert. denied* 499 U.S. 923, 111 S.Ct. 317 (1991). Compensatory education is an in-kind remedy. By providing additional future educational services, a student can be compensated for past denial of due process rights or educational programming that Student should have received. Compensatory education should accrue from the point that the district knows or should know of the IEP's failure, but excluding the time reasonably required for the school district to rectify the problem. M. C. v. Central Regional School District, 81 F.3d 389 (3d Cir. 1996). In this instant matter, Student did not have an IEP since Student was not identified as an eligible student during the period of Student's enrollment in the District. The issue is whether or not the District had reason to suspect that Student might be a student in need of special education services. In order to do so, the District should have initiated screening in accordance with 22 PA Code §14.122, if not a comprehensive evaluation, under Child Find by Student's ninth grade year. Although screening and evaluation do not definitely mean eligibility, lacking such information also does not rule out eligibility.

The independent psychological evaluation conducted on November 3, 2007 concluded that "Student's disabilities indicate the most appropriate services for Student should include a plan for Other Health Impaired, with appropriate supportive services in math". (F.F. #14.) It is only conjecture, however, to categorically proffer in retrospect that Student could have been more successful in staying in school had there been supportive services. (N.T. 270, 277-278.) There is no documentation to support the inference that Student's need for Homebound was the result of a lack of supportive

services. This Hearing Officer, however, finds the Math achievement results to be significant in view of Student's history of having relatively more difficulty in Math. When evaluated as an eleventh grade student, not considering Student's retention in tenth, Student was found to "[be] not successful with long division, complex fractions, decimals or basic algebra...[and make] computational errors in addition, subtraction and multiplication". (N.T. 256-258. P. #10 @ 5.) Arguably, if such comparable information was obtained by the District in ninth grade, Student could have received assistance, if not as an eligible student with an IEP, in Math. However, to postulate that Student was not evaluated and therefore Student did need assistance or an IEP, is a circular argument. For the lack of Child Find activities when the District should have known is, given the facts in this case, a parallel to a denial of a FAPE.

The District opined that the parent's concern leading to these proceedings was not that of Child Find. (N.T. 918. S.D. Closing Statement @ 7-8.) It is clear that the parent's dissatisfaction with the District began in the fall of 2006 when Parent could not find out why Homebound was not started for Student. (N.T. 791-792, 872-888.) The subsequent retention in tenth grade and the inability to arrive at a resolution for "making up work" led to these proceedings. (N.T. 241, 524, 892-893.) Even though the path leading up to these proceedings might have taken different turns, the parent does not forfeit their right, through legal counsel, to frame issues before this Hearing Officer.

The District also opined that the Hearing Officer does not have the authority to fashion a remedy with respect to the period prior to February, 2006, which is more than two years from when the complaint was served on February 21, 2008. (S.D. Closing

Statement @ 8.) 34 CFR §300.511(e) states “a parent or agency must request an impartial hearing on their due process complaint within two years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the due process complaint...”. Although not articulated by the parent in statutory terms, their concerns became transparent in the fall of 2006, which is within two years prior to February, 2008. M. C. and B. C. v. Penn Manor, 906 A.2d 642 (Pa. Commonw. 2006) do not have a limitation on the calculus for compensatory award. The student is entitled to an amount of compensatory education reasonably calculated to bring Student to the position that Student would have occupied, but for the school district’s failure to provide a FAPE. Penn Manor at 651.

Student is, therefore, owed compensatory services due to the District’s failure in its Child Find responsibilities with respect to Student’s need for Math support beginning in ninth grade. The reasonable time for the District to rectify the situation would have been the 60 school days to complete the evaluation process in accordance with 22 PA Code §14.123.⁹ Student was in school during ninth grade for 120 days. Considering one hour of Math instruction per school day, the amount of compensatory education reasonably calculated to bring Student to the position that Student would have occupied would be (120 days - 60 days) x 1 hour/day = 60 hours of Math instruction for ninth grade. For tenth grade, the amount of compensatory education in Math is similarly calculated to be one hour per day that Student was in school up to the prescribed date for Homebound which was October 30, 2006. (F.F. #9.) Student was absent for 16 full

⁹ “...the initial evaluation shall be completed...no later than 60 days after the agency receives written parental consent.” *id.* at (b).

days. (P. #14 @ 5.) Estimating 40 school days, Student is therefore owed (40 - 16) 24 hours of compensatory education for the period prior to Homebound. Student was prescribed Homebound for the remainder of tenth grade. Given five hours of Homebound per week and Math as one of the major subject areas, the amount of compensatory education is reasonably calculated to be one hour per week for the approximate 28 weeks of Homebound.

The total amount of compensatory education owed is therefore $60 + 24 + 28 = 112$ hours for the District's failure to initiate an evaluation of Student when there were sufficient reasons to believe that Student might be an eligible student in the area of Math.

The parent further claimed that the District failed to provide accommodations for Student's illness under 22 PA Code §15. (N.T. 47.) *id.* at 1(b) states in part "...the law and its regulations require public educational agencies to ensure that these students have equal opportunity to participate in the school program...school districts are required to provide these students with the aids, services and accommodations...". Upon review of the record, this Hearing Officer finds only relevant testimony with regards to accommodations during the short period of time when Student attended school in tenth grade. The parent identified specifically the first period teacher in tenth grade who was not understanding or sympathetic of Student's need "to go to the bathroom without much warning". (N.T. 869-871, 898, 905-906, 912-913. P. #13 @ 1.) The District had the mechanism for the classroom teachers to be aware of students who are in need of special accommodations due to chronic medical conditions. (N.T. 396-401.) In the absence of testimony to the contrary, this Hearing Officer concludes that Student was

not provided with the accommodation necessary for Student to participate in the classroom for the time Student attended school in tenth grade. Although the parent implied that the difficulty with the classroom teacher resulted in Student returning to Homebound, there is no testimony on record to substantiate such a claim. (N.T. 871.) There is also no substantiating data, or expert medical testimony, to indicate that all of Student's medical excused absences, or need for Homebound, resulted from the bathroom issue. Again, it was unequivocally stated by Student's Parent that Student withdrew and [redacted]. The proposition that the genesis of Student's Homebound was precipitated by the District failure to accommodate and, that the District was responsible in the amelioration of Student's mental health conditions, thus, cannot be sustained. (N.T. 47. P. Closing Statement.)

Student was absent 14 days with medical excuse. Seven of the 14 days were not consecutive school days. (P. #14 @ 5.) A reasonable remedy for the lack of accommodation is (14-7) 7 days of compensatory education. At five hours of instruction per day, this totals (5 x 7) 35 hours of compensatory education for the denial of access under Ch. 15/Sec. 504.

The combined total of compensatory education owed is therefore (112 + 35) 147 hours¹⁰. The compensatory hours may be used for services and activities after school hours, on weekends, and during school breaks to further Student's academic development. 112 hours are to be in the area of Math and 35 hours are to be in academic subject areas including Math. The total number of hours may be translated

¹⁰ The total hours may be adjusted by the parties by using the school year calendars to count the actual number of school days during the period in which the hours are calculated.

into a monetary amount (average salary plus benefits of a special education teacher in the District for the number of hours) to be applied to academic tutoring and/or enrichment services/activities purchased by the family. This can be a viable arrangement especially if Student is to remain in the Charter School for the 2008-2009 school year.

Accordingly, it is hereby ordered:

VI. ORDER

The LEA is ordered to take the following action:

Student is to be provided with around 147 hours of compensatory education in a manner consistent with the Discussion above.

July 16, 2008

Date

David Y. K. Lee

David Y. K. Lee
Hearing Officer