

*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: KP

Date of Birth:

Date of Hearing: August 24, 2009

**CLOSED HEARING**

ODR Case # 9979-08-09-AS

Parties to the Hearing:

Representative:

Ms. Amy Shoemaker  
Director of Pupil Services  
Eastern Lebanon County School District  
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Date Record Closed:

September 10, 2009

Date of Decision:

September 25, 2009

Hearing Officer:

Jake McElligott, Esquire

## **INTRODUCTION AND PROCEDURAL HISTORY**

Student is a 17-year old student residing in the Eastern Lebanon County School District (“District”) who parents claim should have been identified as a student with a disability under the Individuals with Disabilities in Education Improvement Act of 2004 (“IDEIA”)<sup>1</sup>. The parents have requested compensatory education and tuition reimbursement of a privately funded education placement due to an alleged failure to provide a free appropriate public education (“FAPE”). Specifically, parents allege that the District should have identified the student as a student with an emotional disturbance and specific learning disabilities. The District maintains that the student does not meet the criteria for any identification as a student with a disability under the IDEIA and, consequently, has acted appropriately at all times towards the student.

## **ISSUES**

Does the student qualify under the IDEIA as a student with an emotional disturbance?

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<sup>1</sup> It is this hearing officer’s preference to cite to the implementing regulation of the IDEIA at 34 C.F.R. §§300.1-300.818.

Does the student qualify under the IDEIA as a student with a specific learning disability?

If the student is qualified under the IDEIA as a student with a disability, are parents entitled to compensatory education and/or tuition reimbursement?

### **FINDINGS OF FACT**

1. In the 2007-2008 school year, the student was attending 9<sup>th</sup> grade at the District's high school. (School District Exhibit ["S"]-26, S-27).
2. On March 7, 2008, an incident occurred in class involving the student and the student's [redacted] teacher. (Parents' Exhibit ["P"]35; Notes of Testimony ["NT"] at 233).
3. [Incident redacted]
4. The high school principal performed a perfunctory and not-very-detailed investigation of the event. (NT at 248, 261-262).
5. Complaints were filed with the Pennsylvania Department of Education against both the teacher (for the incident) and the principal (for the investigation of the incident). The results of the investigations found no probable cause that the incident or the investigation would require the pursuit of disciplinary action. (S-37, S-38).

6. The student and student's mother testified that the student's attitude toward school changed markedly after the March 7, 2008 incident. (NT at 43, 67-68, 123-128).
7. The student did not exhibit an inordinately increased number of absences from school after the March 7, 2008 incident, missing only approximately seven school days. (S-27; NT at 257-261).
8. The student's grades did not drop markedly after the March 7, 2008 incident. (S-26).
9. On June 24, 2008, the student was withdrawn from the District. Beginning in the 2008-2009 school year, the student's 10<sup>th</sup> grade year, and continuing through the date of the hearing, the student has attended a private school. (S-36).
10. The parents filed a special education due process complaint in December 2008, a complaint that was withdrawn to allow for the completion of an evaluation of the student. (S-1, S-2, S-3).
11. On December 22, 2008, the District requested permission to perform an initial evaluation of the student. Parents agreed to the evaluation and returned the permission to evaluate form on January 14, 2009. (S-9).
12. The District issued the evaluation report ("ER") on March 11, 2009. (S-14).
13. The ER indicates that, on the Pennsylvania System of School Assessment ("PSSA"), the student was below basic in mathematics

- in 5<sup>th</sup> grade, proficient in mathematics in 7<sup>th</sup> grade, and basic in mathematics in 8<sup>th</sup> grade. (S-14 at page 3).
14. In 9<sup>th</sup> grade, the student's last year at the District, the student earned a C and a D+ in the two quarters when the student had mathematics, and failed the final exam. (S-26 at page 1).
  15. In 9<sup>th</sup> grade, on individual assignment score sheets, the student took thirteen scored quizzes with an average score of 58.68%. The student took six tests with an average score of 66.83%. The student's overall quarterly grades were buoyed by homework and projects. (S-26 at pages 4-5).
  16. The evaluator reviewed only report cards with quarterly and final grades and did not review the individual assignment scores used to calculate the quarterly grades. (NT at 206-207).
  17. Results of the Wechsler Intelligence Scale for Children – 4<sup>th</sup> Edition reveal that the student has a full-scale IQ of 89, right on the cusp of the low average to average range. (S-14 at page 4).
  18. Results of testing on the Wechsler Individual Achievement Test – 2<sup>nd</sup> Edition reveal that the student was borderline or low average in the three mathematical sub-tests numerical operations, math reasoning, and math composite. The District evaluator noted that, in conversations with the math teacher, “[the student] struggles in his class”. (S-14 at page 5).

19. The ER indicates that, at the private school for the 2008-2009 school year up to the 3<sup>rd</sup> quarter, the student's grades averaged approximately 91.45. The student's grade in math averaged 79.33. (S-14 at page 3).
20. Results on the Behavior Assessment System for Children – 2<sup>nd</sup> Edition reveal that the student rates as typical across all measures except for Internalizing Problems where the student was rated by mother and by the math teacher as at-risk or clinically significant (except for a typical rating by the math teacher in the somatization subtest). The evaluator opined in the report that these scores revealed “anxiety symptoms are present both in the home and in the math classroom.” (S-14 at pages 6-9).
21. Results on the Scale for Assessing Emotional Disturbance reveal that the student did not rate on any subtest by any teacher in a range that would indicate an emotional disturbance that would impact learning. (S-14 at page 9).
22. In the report and through testimony, the evaluator attributed the significant discrepancy between the student's cognitive ability and measured math skills to anxiety levels during testing. (S-14 at page 12; NT at 151-152).
23. The student and student's mother testified that the student enjoys the private placement and is making educational and social progress. (NT at 68-70, 84, 135-139).

## **DISCUSSION AND CONCLUSIONS OF LAW**

*Emotional Disturbance.* A student is qualified under the terms of the IDEIA as a student with an emotional disturbance as follows:

“Emotional disturbance” means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance:

(A) An inability to learn that cannot be explained by intellectual, sensory, or health factors.

(B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.

(C) Inappropriate types of behavior or feelings under normal circumstances.

(D) A general pervasive mood of unhappiness or depression.

(E) A tendency to develop physical symptoms or fears associated with personal or school problems.”

(34 C.F.R. §300.8(c)(4)(i)).

In this case, the evidence is clear that the student does not have an emotional disturbance. The student may have anxiety issues that impact the educational environment (FF 20), but nothing in the exhibits or testimony indicate that the student has exhibited any of the necessary criteria over a period of time in, or to a marked degree in, the District. While the consequences of the incident in March 2008 cannot be minimized (FF 2, 3, 6), the incident does not seem to have continued a pattern of emotionally disturbed behavior not to have resulted in emotionally disturbed behavior. (FF 7, 8). Indeed, the assessment administered by the District in testing the student to probe for issues

related to emotional disturbance bears out the fact that the student does not exhibit such behaviors in the school setting. (FF 21).

The evidence produced at the hearing does not support the position that the District knew or should have known that the student had an emotional disturbance that would have qualified the student as a student with a disability under the IDEIA. Accordingly, there was no denial of FAPE in failing to diagnose the student with an emotional disturbance.

*Specific Learning Disability.* In Pennsylvania, a student with a specific learning disability must be identified using one of two methods, either “a process based on a child’s response to scientific, research-based intervention” or “a process that examines whether a child exhibits a pattern of strengths and weaknesses, relative to intellectual ability as defined by a severe discrepancy between intellectual ability and achievement, or relative to age or grade”. (22 PA Code §14.125(2)).

In this case, the student was never identified by the District, so there was no opportunity to gauge the student’s response to scientific, research-based interventions. The District evaluator relied on the second of the two processes, the discrepancy model. (NT at 160-161; see also S-14 at page 12).

Here, the evidence clearly supports the conclusion that the student has a specific learning disability in mathematics. The District’s evaluator

found that a severe discrepancy existed. (FF 22). These results were explained away by the evaluator due to anxiety issues. But the record clearly indicates that the student has had issues with mathematics in the students' years with the District, issues which persist. First, the student has performed poorly on PSSA testing in mathematics. (FF 13). With scores that ranged from below basic to proficient to basic in a span of only three years, the District should have perceived that the student's performance on standardized mathematics assessment was, at best, uneven. At worst, it was a signal that the District should have been evaluating the student in mathematics. Second, a review of the student's mathematics scores in 9<sup>th</sup> grade would clearly have indicated to the District that the student was struggling with classroom assessments in mathematics. (FF 14, 15, 16). Indeed, the student scored one A, one C-, one D, one D-, and two Fs on the six math tests the student took in 9<sup>th</sup> grade. (FF 15). The student's grades in math were buoyed by, apparently, extra credit assignments where the student received scores of 5-out-of-1 and 8-out-of-5. (FF 15). Even in the private placement, mathematics has continued to be a markedly difficult academic struggle for the student. (FF 19).

On this record, it is clear that the student should have been identified as a student with a specific learning disability in mathematics. When, however, should this have been the case?

School districts are charged generally with identifying, locating, and evaluating students with disabilities. (34 C.F.R. §300.111). In this case, the District knew or should have known that the student was struggling with mathematics by the end of 8<sup>th</sup> grade when the student had moved from below basic to proficient to basic in mathematics skills over the course of four school years. (FF 13). At the absolute latest, however, the District should have known that its mathematics instruction in 9<sup>th</sup> grade was highly ineffective and that an evaluation of the student should have been undertaken. (FF 15). Specifically, by March 6, 2008 (the day before the incident occurred), the student had taken six quizzes and three tests since mathematics class began in January 2008. The student received one A+, one B-, one D, and three Fs on the quizzes; the student received one C-, one D, and one D- on the tests. (S-26 at page 4).<sup>2</sup>

Therefore, it is the considered opinion of this hearing officer that the District should have requested permission to evaluate the student for a specific learning disability in mathematics by mid-March 2008, meaning that an evaluation report would have been issued by mid-May 2008. (22 PA Code §123(b)).

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<sup>2</sup> The student's A+ came on the second graded assignment—the “expectations” quiz. The B- came on an unidentified quiz on the same day. The degradation in grades as listed took place chronologically. In other words, each successive quiz/test had a lower grade than the quiz/test taken before.

*Remedies.* Parents have claimed compensatory education for a period after March 7, 2008 through the end of the 2008-2009 school year. Given the analysis above, even if the District had appropriately evaluated the student, it is unlikely that specially designed instruction could have been agreed-to and implemented from the period from mid-May 2008 through the end of that school year. Accordingly, a remedy of compensatory education is not available for this deprivation of FAPE. In short, there is no denial of FAPE for missed instruction through the end of the 2008-2009 school year.

There is, however, a remedy for tuition reimbursement. Long-standing case law and the IDEIA provide for the potential for private school tuition reimbursement if a school district has failed in its obligation to provide FAPE to a child with a disability 34 C.F.R. §300.148; 22 PA Code §14.102(a)(2)(xvi); Florence County District Four v. Carter, 510 U.S. 7 (1993); School Committee of Burlington v. Department of Education, 471 U.S. 359 (1985).

A substantive examination of the parents' tuition reimbursement claim proceeds under the three-step Burlington-Carter analysis, which has been incorporated implicitly in IDEIA (34 C.F.R. §§300.148(a),(c),(d)(3)).

In this three-step analysis, the first step is an examination of the school district's proposed program. Here, the District has denied the student a FAPE by not identifying the student as a student requiring

specially designed instruction to address a specific learning disability in mathematics.

When the school district's program is found to be inappropriate, as here, the second step is an examination of the appropriateness of the private school program which the parents have selected. Here, there was very little evidence or testimony as to the student's private program. What is a matter of record, however, shows that the student is making academic progress across all classes and, by general report, has found the private placement to be appropriate. (FF 19, 23).

When the school district's program is found to be inappropriate, as here, and the private placement is found to be appropriate, as here, the third step of the analysis is to determine if tuition reimbursement is a fair remedy and, if so, in what amount. This is the so-called "balancing of the equities" step. In this case, I find that the parents should not be compensated for private schooling before December 2008 because they did not inform the District that they would look to the District to fund the private placement. (FF 10). I also find that the private placement is a religious school that provides, as part of its instruction, a class for the student in theology. (S-14 at page 3). It would not be appropriate, nor legal, to have the District pay for this instruction. Therefore, the amount of tuition reimbursement will be reduced accordingly.

## **CONCLUSION**

The student has been denied a free appropriate public education as the result of the student not being identified as a student requiring specially designed instruction as the result of a specific learning disability in mathematics. Tuition reimbursement for the student's private placement will be ordered.

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## **ORDER**

In accord with the findings of fact and conclusions of law as set forth above, the student is deemed to be a

student who requires specially designed instruction to address a specific learning disability in mathematics.

The District is ordered to reimburse the parents for the private placement tuition prorated from January 1, 2009 through the end of the 2008-2009 school year, and until such date as the District proposes an appropriate program and placement for the student.

The award of reimbursement includes any out-of-pocket expenses incurred by the parents for transportation to the private placement, either by receipt or using mileage reimbursement as allowable under Internal Revenue Service mileage reimbursement rates for the period(s) in question.

The award of tuition reimbursement shall be reduced, however, by the percentage of the school day in question the student spent in religious instruction or religion classes.

*Jake McElligott, Esquire*

Jake McElligott, Esquire  
Special Education Hearing Officer

September 25, 2009