

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: J.R.

Date of Birth: xx/xx/xx

Date(s) of Hearing: January 18, 2006

CLOSED HEARING

ODR NO. 5960/05-06 LS

Parents:

Parents' Representative:

Hilary Kinal, Esq.
682 – 3rd Street
Beaver, PA 15009

School District:

District Representative:

Western Beaver Co. S.D.
343 Ridgemont Drive
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Transcript Received: 1/26/2006
Date Record Closed: 1/18/2006¹
Date of Decision: 2/2/2006
Hearing Officer: Margaret Drayden, Esq.

¹ Hearing Officer reopened the record while writing this Decision to admit her prior Decision, dated 10/3/05, solely for the purpose of obtaining Student's correct placement.

Précis

This is the second due process hearing for Student (“Student”), born xx/xx/x, a xx-year old child who resides with her Father and paternal Grandparents in the Western Beaver County School District (“District”). Student currently receives 2-1/2 hours of tutoring per day (Monday through Thursday) at a District school as a student receiving instruction in the home.

Findings of Fact

1. Student’s birth date is xx/xx/xx. (NT at 128.)²
2. Student is xx years old and lives with her family in the District. (NT at 147, 244; SD-4, SD-6.)
3. Student was identified as a child with an emotional disturbance in first grade and she continues to be so identified. (SD-2, SD-4, SD-6.)
4. Student’s current educational placement is instruction in the home, although Student meets her tutor at school from 3:00 p.m. to 5:30 p.m. Monday through Thursday. The Psychiatric Evaluation misstates Student’s educational placement as “homebound instruction”. (NT at 26-27, 90, 256; SD-6, HO-3 at FF No. 62.)³
5. The District filed for a due process hearing when Parents and District could not agree on an interim placement for Student. (NT at 23.)
6. The District contacted all 13 school districts in the county and learned that only 3 have emotional support programs for middle school students on campus; 2 of those do not take outside students, and the other one had previously accepted Student, but due to behavior difficulties, Student was asked to withdraw last year, thus leaving no schools in the county which could provide an emotional support program. (NT 25, 50-52, 67-68, 227-28, 233-34, 251-52.)
7. The District also queried all of the school districts if they could provide Student instruction in a learning support program, as learning support is a multi-classified program but was told “no”. (NT at 50, 68.)
8. The District offered [Redacted], a school providing emotional support for students with said need, as an interim placement; Parents wanted a regular education setting with itinerant support and counseling available on an as-needed basis. (NT

² Parents’ exhibits are noted as “P-“; District exhibits are noted as “SD-“; Hearing Officer exhibits are referenced as “HO-“; Noted Transcript is referenced as “NT”; Findings of Fact are noted as “FF”.

³SD-6, which is a Psychiatric Evaluation, dated 12/12/05, mis-stated Student’s placement as “homebound instruction. Instruction in the home is a special education placement while homebound instruction is not. 34 C.F.R. Sec. 300.26(a)(i). HO-3 at FF No. 62 found the “3/31/05 NOREP changed Student’s placement to instruction in the home. (SD-11; NT at 64-68, 584-86.)”

at 23-24, 246, 254.)

9. The District also discussed with Parents the option of a cyber school program, with regular 8 a.m. to 3 p.m. school hours, where students do academic work at home on computers, have weekly contact with teachers, and have outings with non-disabled peers. (NT at 69-73).
10. On 10/18/05 District issued a NOREP which recommended a full-time program of emotional support at a special education center (NT at 25, 42; SD-1.)
11. The District Superintendent, upon hearing Parents state they had been told emotional support classrooms were available at other schools in the county, immediately called to verify the same, but was told no emotional support classes were available. (NT at 117-18, 123-25, 232-34.)
12. The Director of Special Education at the local IU testified that currently there is one classroom for students with emotional support needs but it served students in grades 10-12. (NT at 80-81.)
13. The IU would consider a request by the District to provide a part-time emotional support teacher because IUs are required to ensure there is a complete range of services available throughout the county. (NT at 83-87.)
14. The District submitted Student's artwork and writing samples to college professors to determine [Student's abilities] in those areas. [Redacted.] (NT at 34, 36-37; SD-3, SD-5.)
15. On 12/4/05, Student was seen by an independent state certified school psychologist to determine if frontal lobe deficits or attention deficit/hyperactivity have influenced her educational performance. The following assessment procedures were used:
 1. Woodcock-Johnson Tests of Cognitive Ability – Third Edition (“WJ-III”)
 2. Delis-Kaplan Executive Function System (“D-KEFS”)
 3. Connors Continuous Performance Test – Second Edition (“CPT-II”)
 4. Hawthorne Attention Deficit Disorders Evaluation Scales – Third Edition, Home Version (“ADDES”)
 5. Behavior Rating Inventory of Executive Function – Parent Form (“BRIEF”)
 6. Interview
 7. Records Review (SD-4.)
16. The result of the independent school psychologist's evaluation was a finding that Student did “not indicate significant weaknesses in regards to executive processes or the presence of an attention deficit hyperactivity disorder.” (Id.)
17. On 12/12/05, Student was seen by a psychiatrist who concluded, *inter alia*:

- “A definitive diagnosis is not possible given [the] degree of defensiveness and denial in the interviews that I conducted.”
 - “Certainly the anger and irritability described in [Student’s] behavior suggests a mood disorder....oppositional and defiant behaviors are described.”
 - “[Student] has been the victim of peer teasing but it seems that is now how every situation is perceived by [Student] and her family.”
 - The family wants any and all harassing prevented “yet they do not want her identified in any particular way with therapeutic personnel, to be involved in more special education services or placed in a smaller more controllable environment. Additionally, there is no expectation by [Student] or her family that she should do anything differently.”
 - “I would not anticipate that [Student] would do socially and behaviorally better if she were just in a different school setting.”
 - “It is unfortunate that [Student] has been supported and encouraged . . . in her defensiveness. She does not appear to have the ability to look at her own behavior that contributed to the difficulties. The degree of blaming on external factors will not serve her well in the school setting or her future development.”
 - “I agree that [Student] can best be served in a very small school setting such as would be available in an approved private school where the situations [Student] perceives as being harassing can be monitored and processed. There [Student] may be encouraged to develop better coping and interaction skills with her peers and learn conflict resolution.”
 - “I recommend that [Student] not return to [the District]. There seem to be too much negative past history to overcome.”
 - “[Student’s] family contends that she would do better in a different school district without the past history and without emotional support services. [Student’s] superior attitude and defensiveness and sensitivity to perceived harassment would likely result in similar situations developing as they did quickly in [the other school district] when she attended there. If she were to go to a regular school I would expect her to need more rather than less Emotional Support services especially in unstructured settings and less supervised areas.”
 - “If [Student] participates in a school program without a therapeutic component, I would recommend that she participate in psychotherapy to address and process the experiences she is having and have her mood monitored.” (NT at 40-41, SD-6.)
18. The IEP team met on 1/12/06 and in a meeting which took some 3 hours, crafted a new IEP, for Student’s annual review, this IEP provides for a full-time emotional support placement with related services which include a behavior intervention plan (“BIP”), counseling, parent counseling/training, social work services, mental health services, and nursing services for Student’s asthma. (NT at 28-31; SD-2.)
19. The 1/12/06 IEP, under Present Levels of Academic Achievement, states that math is Student’s “most difficult subject. Often, concepts have to be retaught for

- her to master them. She gives the most resistance in mathematics with completing assignments. She has difficulty in applying the concepts to everyday life. She does not know the rules for operations. She has difficulty solving multi-step problems.” This contrasts with her abilities in English, which reflect she “was able to master the material... She enjoyed the selection of reading materials [and] ... was able to comprehend and apply the material.” In Science, Student “understands and is able to retain the information taught in science...She enjoys the subject matter.” (NT at 32-33; SD-2.)
20. The 1/12/06 IEP listed strengths and weaknesses, which included observations by the para-professional during the tutoring sessions, *inter alia*:
 1. Responding well to positive reinforcement
 2. Seeking assistance when needed
 3. Enjoying reading assignments
 4. Willingness to follow directions
 5. Acceptance of constructive criticism
 6. Some depression and daydreaming
 7. Low self-esteem – referring to herself as “stupid”
 8. Demonstrating anger and mood swings
 9. Blaming others for her low grades in math (Id.)
 21. The 1/26/05 IEP listed 15 items as educational needs, including:
 1. A structured, physical classroom environment with a consistent routine
 2. Using appropriate language with peers and adults
 3. Keeping her hands to herself
 4. Developing social skills when interacting with peers and making appropriate comments when disagreeing with peers
 5. Controlling her anger; learning anger management skills and coping skills
 6. The Family’s need for counseling/education in understanding the nature of emotional disabilities and how it impedes one’s educational, social and emotional achievement
 7. The need for outside agencies to meet Student’s mental health issues. (Id.)
 22. Student’s 7th grade academic marks were varied. She attended regular education classes for at least the first quarter and her grades were: Math – D; English – B; Science – F; History – D; Reading – C; second quarter grades were all Cs; third quarter grades were: Math – C; English – B; Science – C; History – B; Reading – A; fourth quarter: Math – C; English A; Science C; History – F; Reading – C. (P-2; NT at 129, 137, 139-40, 142-43.)
 23. Student’s 8th grade academic marks for the first quarter: Pre-Algebra – D; Science – B; Civics – A; English – A; Reading – NC (“NC” = No Credit; Student understands that this will change to a letter grade due to homework being turned in. (Id.; NT at 131-133, 144-45.)
 24. Student testified she believes she’s not being taught pre-Algebra “as if I would be

- in a classroom.” (NT at 130-31.)
25. Student testified that her tutor/facilitator told her he didn’t know pre-Algebra and would get frustrated with the subject; she told her Grandmother the same thing. (NT at 139, 146, 156-57.)
 26. The tutoring aide testified that math appeared to be one of the teacher/facilitator’s best subjects, that she never witnessed him tell Student he didn’t understand the subject and never saw him get frustrated with Student or with the academic subject matter. (NT at 188-89, 193-94.)
 27. The tutor/facilitator is a special education teacher in the District for 3^d and 4th grades, is the high school facilitator, is the resource room teacher, and has a bachelor’s degree in special education and elementary regular education. (NT at 89, 104, 108.)
 28. The tutor/facilitator stated he is qualified to teach pre-Algebra and never expressed to Student that he didn’t know the subject matter. (NT at 199-200.)
 29. Student experiences difficulty in math approximately 3 times a week, gets frustrated and refers to herself as being stupid in math. (NT at 72, 94-100, 107-08 113-14, 129-30.)
 30. Student’s academic frustration can include anger, asking tutor/facilitator to explain each math problem even though she has comprehension, and shutting down. (NT at 110.)
 31. Student’s frustration sometimes exceeds normal parameters and tutor/facilitator, who teaches 2 inclusion settings, believes Student needs more than just a regular education setting in order to be successful. (NT at 104, 108-09.)
 32. Grandmother testified Student has a harder time with math than other subjects (NT at 181-82.)
 33. Grandmother testified she did not object to a Therapeutic Support Staff (“TSS”) person in the classroom with Student. (NT at 151, 174, 235.)
 34. Grandmother testified she did not want a TSS or Student did not need a TSS in the classroom with Student. (NT at 168, 235, 237, 239-41, 242-43.)
 35. Father testified he sees Student needing a regular education classroom with itinerant support “with outside counseling...a little bit of focus on social skills and things like that.” (NT at 254-55.)
 36. Parents and Student continue to see Student’s educational difficulty as other children harassing Student, not any misbehaviors on Student’s part. (NT at 141,

151, 174, 181, 214-15, 221-23, 235, 237-38, 241.)

37. Parents believed this due process hearing was solely to address interim placement. (P-3; NT at 255.)
38. Parents agreed to continue Student in the tutoring until an interim placement decision is reached. (Id.)
39. Parents did not receive a copy of the Psychiatric Evaluation until 1/13/06. (NT at 245.)

Issues

1. What is the appropriate interim placement in order for Student to receive a free appropriate public education?
2. Is Student entitled to compensatory education due to inadequate instruction in math?
3. Is Student's permanent placement correctly before this Hearing Officer?

Discussion and Conclusions of Law

Jurisdiction

A due process hearing is a hearing authorized through special education laws of both federal and state legislation. The jurisdiction of such a hearing is highly circumscribed. A hearing officer cannot decide any issue – no matter how significant – which is outside those narrowly defined perimeters. Thus, any concerns parents may have regarding education services which concern matters beyond those perimeters are beyond the purview of this process and this hearing officer. Within the context of the special education arena, however, “[h]earing officers are empowered to judge the credibility of witnesses, weigh evidence and, accordingly, render a decision wherein the hearing officer has included ‘findings of fact, discussion and conclusions of law. . . [and] the decision shall be based solely upon the substantial evidence presented at the

hearing.’”⁴ Quite often, testimony – or documentary evidence – conflicts; this is to be expected for, had the parties been in full accord, there would have been no need for a hearing. Thus, as stated, part of the responsibility of the hearing officer is to assign weight to the testimony and documentary evidence of facts which concern a child’s special education experience.

Free Appropriate Public Education

The Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. Section 1412 *et seq.*, requires that local education agencies provide a free appropriate public education (“FAPE”) to all eligible students.⁵ The Supreme Court, in Board of Education of Hendrick Hudson Central Sch. Dist. v. Rowley, 458 U.S. 176 (1982), held that FAPE constitutes compliance with IDEA’s procedural requirements and by providing individualized instruction and sufficient supportive services reasonably calculated to yield educational benefit. This individualized education program must provide meaningful educational benefit.⁶ While the law does not require school districts to offer optimal educational programs to maximize the child’s potential, the FAPE standard is met only when the child’s program provides more than a *de minimis* educational benefit.⁷

Issue No. 1: What is the appropriate interim placement in order for Student to receive a free appropriate public education?

Preliminarily, it is important to note that this Student continues to receive

⁴ Spec. Educ. Op. No. 1528 (11/1/04), quoting 22 PA Code, Sec. 14.162(f).

⁵ 20 U.S.C. Sec. 1412.

⁶ *See, e.g.*, Fuhrmann v. East Hanover Bd. Of Educ. 993 F.2d 1031 (3d Cir. 1993); Polk v. Central Susquehanna I.U. 16, 853 F.2d 171 (3d Cir. 1988).

⁷ Polk v. Central Susquehanna I. U. 16, 853 F.2d 171 (3d Cir. 1988).

instruction in the home.⁸ The 12/12/05 Psychiatric Evaluation reports Student's placement as "homebound instruction".⁹ This is incorrect. Although it may seem to the lay person as hypercritical parsing, there is a significant difference between "instruction in the home" and "homebound instruction" in the law. While they are not mutually exclusive terms, "instruction in the home" is special education for children who, due to extraordinary medical needs or mobility impairments, are unable to attend school; on the other hand, "homebound instruction" is not a special education placement and is intended for students who are not necessarily identified as eligible for special education but who are "excused from compulsory attendance under 22 Pa. Code Sec. 11.25 due to temporary mental or physical illness or other urgent reasons."¹⁰

In either event, pursuant to Cordero v. Commonwealth of Pennsylvania and Pennsylvania Department of Education, 19 IDELR 623, 625 (M.D. Pa. 1993) the District has the express obligation to identify "all children assigned to instruction in the home or homebound instruction for reasons other than physical illness or mobility or other problems that prohibit the student's departure from home." The evidence is preponderant that Student has met the threshold requirements for Cordero status of "waiting for more than 30 days for the provision of an appropriate educational placement."¹¹ The BEC entitled "Intensive Interagency Coordination, 20 U.S.C. Sec. 1412(a)(12)" and dated 12/16/02 requires identification of students "(1) whose districts have determined that they cannot currently be served in the public educational setting; and (2) who have waited

⁸ Although I attempted to document on the record Student's current placement (NT at 256-57) and the response was an honest effort to respond quickly, the answer reflected what had been Student's ongoing placement over the course of many years not the current placement which changed as of 3/31/05. See FF #4.

⁹ SD-6.

¹⁰ Basic Education Circular, Instruction Conducted in the Home, 34 CFR Sec. 300.269a)(1).

¹¹ Cordero, at 624-25.

more than 30 days for the provision of an appropriate educational placement (or are at substantial risk of waiting more than 30 days for a placement). These reports must be filed within 5 days of initial identification of these students and must be updated on a continuous basis until an appropriate placement is provided...School districts must also report students with disabilities who are placed on instruction conducted in the home or who receive homebound instruction in accordance with BEC 34 CFR Sec. 300.26(a)(1), Instruction Conducted in the Home, so that the Department [of Education] can determine whether these students require intensive interagency coordination.”

The fact that the District and Parents agreed that tutoring would be provided in a classroom after school does not remove the necessity of seeking local inter-agency and state-level assistance. This was a matter of convenience for the parties and did not affect the placement as stated in Student’s 3/31/05 NOREP.¹² Although neither the District nor Parents raised Cordero as a factor in this case, the District still has the affirmative duty to notify the Department of Education within 5 days if it has not done so already.

Now we must address interim placement. The District clearly sees Student as needing a full-time emotional support placement, which it does not offer. District personnel have called all of the other school districts in the county and ascertained that only 3 of them offer more than itinerant emotional support and none of those 3 could accommodate Student.¹³ Then, the District asked if Student could be accommodated through a learning support environment and was also told “no.”¹⁴ The District next looked at private placement and offered [Redacted]. This was summarily rejected by Parents who feel Student’s needs can continue to be met with an itinerant emotional

¹² FF#4.

¹³ FF#6.

¹⁴ FF#7.

support program and counseling on an as-needed basis.¹⁵

The evidence is preponderant that Student cannot be provided with a free appropriate public education (“FAPE”) with an itinerant emotional support program. This Hearing Officer found an itinerant emotional support program to be insufficient to meet Student’s needs during the first hearing.¹⁶ An itinerant support program continues to remain insufficient to provide Student FAPE. In looking at the range of services an eligible child can receive, itinerant instruction is the least amount of service in the least restrictive environment.

34 C.F.R Section 330.551(b) includes itinerant instruction under the umbrella of supplementary services.¹⁷ Clearly, the mandate of LRE is that identified children are in regular education classrooms unless their needs cannot be met with supplementary aids and services.¹⁸

Nonetheless, Pennsylvania’s Education Code, at 22 PA Code, Sec. 14.141, specifically states that even itinerant education can be provided outside of the regular education classroom.¹⁹ Thus, even if Student’s needs could be met in an itinerant

¹⁵ FF#35.

¹⁶ Sessions were held on 7/27/05, 7/28/05 and 8/25/05, and the Decision issued on 10/3/05 (the record was reopened when the HO found the requisite ER and IEP had not been included in evidence.)

¹⁷ 34 C.F.R. Section 330.551(b) addresses the necessity of public agencies to ensure there is a continuum of alternative placements available by requiring the agencies to “[m]ake provision for *supplementary services* (such as resource room or *itinerant instruction*) to be provided in conjunction with regular class placement.” (Emphasis added.)

¹⁸ Under the heading “Least Restrictive Environment”, 34 C.F.R. Section 330.550(b) requires:

Each public agency shall ensure –

- (1) That to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and
- (2) that special classes, separate schooling or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of *supplementary aids and services* cannot be achieved satisfactorily. (Emphasis added.)

¹⁹ “Regular classroom instruction for most of the school day, with special education services and programs provided by special education personnel *inside or outside of the regular class* for part of the school day.” (Emphasis added.)

program – which I find they cannot - Parents’ expectation that Student being continued in an itinerant program automatically requires Student continuing in a regular education classroom for the full day is misplaced.

The Third Circuit addressed the issue of least restrictive environment in Oberti v. Board of Education of Clementon School District, 995 F.2d 12094 (3d. Cir. 1993). The court set forth what is now a famous two-part test to determine the appropriateness of a student’s placement. First, the court determines whether education in the regular classroom with supplementary aids and services can be achieved satisfactorily. This is done by looking at what steps the district has taken to include the student in the regular classroom; next, the court compares the educational benefits the child would receive in the regular classroom against the benefits the child would receive in a more restrictive environment; then, the court looks at the negative effects inclusion may have on other children in the regular classroom. The second part of the test is that if the court finds that placement outside the regular classroom is necessary, the court must decide whether the district has mainstreamed the child to the maximum extent possible.

The District has shown it has no emotional support classrooms for middle school children and it has searched throughout the county and finds no emotional support classroom available for Student in a public education setting. I am not convinced that Student’s emotional needs are such that she should be removed from a public education setting to an approved private placement *at this time*. I am persuaded that Student needs interaction with nondisabled peers which cannot be achieved in a private setting. Therefore, the District will immediately contact school districts in [Redacted] County, up to a distance of 50 miles from the District, and ascertain whether a part-time emotional

support class is available and, if so, if they are amenable to accepting Student. The District will make a list of all school districts which offer a part-time emotional support program to Student within 4 school days of receipt of this Decision. Parents will then review the list and must choose from among the school districts offered.²⁰ Parents may contact the schools before making their decision, but their decision must be made within 10 school days of receiving the list of choices. If they refuse, the District shall choose the school district Student will attend. Regardless of which party makes the choice – once it is made – the District shall immediately – no later than the next school day – make all arrangements for Student to attend the interim placement.

Issue No. 2: Is Student entitled to compensatory education due to inadequate instruction in math?

Student certainly has not received grades commensurate with her educational abilities. Nonetheless, the evidence presented did not show that Student’s lack-luster performance was the result of less than acceptable teaching. Student testified that if she were in a regular education classroom she’d have better grades. The evidence is to the contrary. Student was in a regular education classroom with a math teacher the first quarter of 7th grade and received a “D”. The rest of the 7th grade Student was tutored and her math grades for the 2^d, 3rd, and 4th quarters were “Cs”.²¹ For the first quarter of the 8th grade Student again received a “D” in math.²² At worst, Student’s grade in math is no lower than when she was in a classroom. Additionally, her tutor testified, credibly, that

²⁰ Spec. Educ. Opinion No. 1286 (10/28/02), page 7, required Parents to choose from a list of placements offered.

²¹ FF#22.

²² FF#23.

he never stated he did not know the subject matter.²³ The class aide testified, credibly, that, in her opinion, math was one of the tutor's best subjects and that he never was frustrated with the Student or the subject matter.²⁴ On the contrary, Student experiences frustration with learning pre-Algebra and refers to herself as being stupid in math.²⁵ Additionally, Grandmother testified, also credibly, that math is one of Student's more difficult subjects.²⁶

I find there is no basis for an award of compensatory education for failure to teach the subject matter.

Issue No. 3: Is Student's permanent placement correctly before this Hearing Officer?

A review of the testimony and evidence clearly shows that permanent placement was not before me. Therefore, I make no determination of what that program and placement will be other than to say that the evidence overwhelmingly shows that Student's needs cannot be satisfied – which is to say Student cannot receive FAPE – in an itinerant emotional support placement. Student needs at least a part-time emotional support classroom with supplementary aids and services and, if that fails to meet her needs, she will need the somewhat more restrictive placement of a full-time emotional support classroom. Although both the District and the Parents believe Student should be taught outside of the District due to past history and rancor, I strongly urge the parties to include the IU in their discussions of placement and see if the IU can provide a teacher and classroom, preferably within the District, that can meet Student's needs.

²³ FF#28.

²⁴ FF#26.

²⁵ FF#29, 30, 31.

²⁶ FF#32.

Order

For the reasons hereinabove discussed, it is hereby ordered that:

1. The interim placement for Student is a part-time emotional support classroom in a regular education school setting. Within 4 school days of receipt of this Decision, the District is required to contact public schools in [Redacted] County within 50 miles of its offices and determine which school districts offer a part-time emotional support program and are willing to accept Student. Parents will then review the list and must choose from among the school districts offering said program. Parents may contact the schools before making their decision, but their decision must be made within 10 school days of receiving the list of choices. If Parents refuse, the District shall choose the school district Student will attend. Once a decision has been reached the District shall immediately – no later than the next school day – make all arrangements for Student to attend the interim placement.

2. Student is not entitled to compensatory education for an alleged lack of mathematical instruction.

3. The issue of Student's permanent placement is not before this Hearing Officer at this time.

4. The District will comply with the Cordero reporting requirements if it has not already done so.

Margaret Drayden, Esq.

February 2, 2006

Hearing Officer