

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.M.

Date of Birth: [redacted]

Date of Hearing: November 9, 2010

OPEN HEARING

ODR No. **01714-1011JS**

Parties to the Hearing:

Parents

Mrs. Connie Fiorante
Director of Pupil Services
Neshannock Township School District
3834 Mitchell Road
New Castle, PA 16105

Representative:

James R. Clark, Esquire
277 Millwood Road
Lancaster, PA 17603

Jonathan Solomon, Esquire
421 E. Moody Avenue
New Castle, PA 16101

Date Record Closed:

November 16, 2010

Date of Decision:

November 29, 2010

Hearing Officer:

Cathy A. Skidmore, M.Ed., J.D.

INTRODUCTION AND PROCEDURAL HISTORY

[Student] (hereafter Student) is a [pre-teenaged] resident of the Neshannock Township School District (hereafter District) and has been identified as in need of gifted educational programming. Student's parents filed a due process complaint on October 26, 2010 claiming that the District failed to provide [Student] with an appropriate gifted education for the one-year time period immediately preceding the filing of the complaint.¹

The matter proceeded to a due process hearing which was completed in one session. Both parties presented evidence to support their respective positions.² For the reasons which follow, I find in favor of the parents and Student.

ISSUES

1. Whether the District provided an appropriate gifted education to Student;
2. If not, is Student entitled to compensatory education and in what amount.

FINDINGS OF FACT

1. Student is [pre-teenaged] and resides in the District where [Student] is currently in sixth grade. Student has been identified as gifted. (Notes of Testimony (N.T.) 20; Parent Exhibit (P) 2)
2. Student was in private school through second grade and entered the District in the third grade. [Student] was first identified as gifted by the District during [Student's] third grade year (2007-08). The January 2008 Gifted Written Report (GWR) reflected a full scale IQ of 134 on the Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV). On the Wechsler Individual Achievement Test-Second Edition (WIAT-II), Student achieved scores in the Superior range in Reading, in the High Average range in Mathematics, and in the Superior range in Written Language. Student's parents and teachers also provided input into the GWR. Notably, Student's classroom teacher rated Student within the High range on the Chuska Scale for Rate of Acquisition and Rate of Retention. (N.T. 82-87; P 11)

¹ In gifted education cases where compensatory education is sought, "a party can only challenge the GIEPs falling within the one-year period prior to the request for a due process hearing," *B.C. v. Penn Manor School District*, 906 A.2d 642, 648 (Pa. Comm. 2006), subject to an exception not raised here.

² At the hearing, counsel stipulated that the date of the challenged GIEP is September 24, 2009, not September 24, 2008 as set forth in the October 26, 2010 due process complaint. The complaint was accordingly amended on the record to reflect the correct date. (Notes of Testimony (N.T.) 11)

3. Student's Gifted Individualized Education Program (GIEP) for fourth grade addressed Student's needs in Algebra, Reading, Spanish, and Technology, as well as for participation in extra-curricular activities which were academically-oriented. (N.T. 58-62, 63-64; P 4)
4. Student was in an advanced Mathematics class in fourth grade, acceptance into which was based upon four specific criteria: scores on the Pennsylvania System of Statewide Assessment (PSSA) and Iowa Test of Basic Skills (ITBS) in third grade, performance on the third grade year-end Mathematics final, and report card grades. (N.T. 96-97, 100)
5. Student achieved scores of 95 or better in all academic classes in fourth grade: Reading, English, Spelling, Social Studies, Mathematics, and Science/Health. In ungraded subjects, Student achieved Honors marks for the majority of the four marking periods that school year in Music, Art, and Physical Education. (N.T. 95-97; P 7)
6. On the PSSAs in the spring of 2009, Student scored in the Advanced level in Mathematics, Reading, and Science. (P 8)
7. Student's GIEP team developed a new annual GIEP in late September 2009. Members of the team included Student's parents, [Student's] regular education teacher, the enrichment teacher, and the Director of Pupil Services. (P 2)
8. In that September 2009 GIEP, Student's Present Levels of Educational Performance (PLEPs) provided brief descriptions of Student's strengths by [Student's] parents ("communication skills, good memory, helpful nature and ability to easily learn new materials") and [Student's] third grade teacher ("excelled in all academic areas, was creative, a self-starter, and displayed leadership skills"), with a note that [Student's] fourth grade teacher had "similar comments." Student's WISC-IV score range (Very Superior) was also noted. (P 2 at 2)
9. Student's September 2009 GIEP contained a goal to enhance Pre-Algebraic thinking skills with a Short-Term Learning Outcome to "master the concepts of pre-algebra" with objective criteria to "increase [Student's] knowledge of algebra;" a goal addressing Reading Comprehension and Composition with a short-term learning outcome to "perform weekly writing in the enrichment class" and objective criteria to "write on a weekly basis in the enrichment classroom;" goals and short-term learning outcomes to participate in Academic Games in Linguistics and Equations and the Math 24 Competition with objective criteria to "continue to learn about the [] games;" a goal and short-term learning outcome to participate in technology, research, and other projects throughout the year, with objective criteria to "use technology" to complete projects and "use [Student's] mathematical skills;" and a goal in Science Experiments with a short-term learning outcome to "research and perform experiments on given topics." There was also a goal and short-term learning outcome to "[e]xplore special interests" of [Student's] choice with objective criteria to "expand [Student's] knowledge of research and experimenting." (P 2)

10. At this September 2009 GIEP meeting, Student's parents actively participated in the development of the gifted program, and asked about accelerating Student in Spelling or providing some type of pullout program or other curriculum modifications such as providing Student with a foreign language (Spanish). They also informed the GIEP team that Student typically did not bring home much homework. Because the District did not offer Spanish at the elementary school, there was no further discussion of including a foreign language in Student's program. (N.T. 36-38, 127-32, 139, 145, 149-51)
11. The September 2009 GIEP did not contain any specially designed instruction (SDI) for any of the identified goals. The PLEPs lacked any achievement measures, grades, progress on goals, and instructional levels; also absent was any description of Student's aptitudes, interests, and specialized skills. (N.T. 22-24, 29-30; P 2)
12. The District did not provide the parents with a Notice of Recommended Assignment (NORA) to approve or disapprove the September 2009 GIEP. However, the parents did not state any specific disagreement with the GIEP at the meeting or any time during the 2009-10 school year. (N.T. 32-34, 36-38, 39-43, 127, 144, 154)
13. On the ITBS administered in October 2009, Student achieved scores of 88 or better in Reading, Language, and Mathematics, with a Core total score of 99 reflecting high achievement overall. (P 5)
14. Student was in the accelerated Mathematics class for fifth grade, placement for which was determined by Student's fourth grade scores on the ITBS and PSSA, report card grades, and end-of-year testing. Student's fifth grade Mathematics teacher often had the class participate in enrichment activities. He believed that Student was appropriately challenged by the accelerated Mathematics class that year. (N.T. 68-69, 93-94, 108-09, 112-17)
15. Student also demonstrated strengths in the areas of Reading, Writing, and Spelling. (N.T. 75-78, 124-25, 137-39)
16. During [Student's] fifth grade year, Student went to the gifted teacher's classroom for a pullout program of enrichment for one half hour three days each week. There were approximately 22 students who attended that pullout program which addressed Reading, Mathematics, and Science, as well as Social Studies and Current Events. Some of the enrichment activities were done as a group, some individually, and some in pairs of students. (N.T. 46-47, 64-65, 80)
17. Every fifth grade student in Student's enrichment class had essentially the same GIEP.³ (N.T. 48-49, 51-52) However, Student's gifted teacher did individualize each individual

³ At the hearing, one of the witnesses gave testimony about a document which was referred to and admitted as P 3 and identified as a GIEP for a different fifth grade student. (N.T. 49, 51, 54-55) There were concerns raised about the inclusion of indentifying information in that GIEP which had not yet been redacted (N.T. 49-51), and the District stipulated that this document was a GIEP for a student other than Student so that it could be properly redacted. (N.T. 156) By email messages dated November 12, 2010 and November 27, 2010, counsel for the parents withdrew P3 from the evidence of record and asked that

student's, including Student's, enrichment activities through a variety of methods: formative assessments, daily communication with Student's teachers to determine areas in need of review or enrichment, and development of individualized rubrics for specific projects which were tailored to Student and the particular activity. (N.T. 24-26, 30-31, 52-55, 66-73)

18. The gifted teacher also offers an open enrichment period on Wednesday afternoons, which is a time that students have the opportunity to go to that classroom to work on and complete projects. This open enrichment time is during scheduled class periods and Student had other classes [Student] did not want to miss, so [Student] did not take advantage of this additional enrichment time. (N.T. 65-66, 80-81)
19. In fifth grade Social Studies class, at the request of Student's parents, Student's teacher required [Student] to prepare [Student's] own study guides/review sheets for all tests and quizzes. Student did so willingly and consistently. There were no other modifications made to the classwork for Student in that subject, although [Student] sometimes shared some of [Student's] writing with the Social Studies teacher. (N.T. 119-22, 124-25)
20. Student achieved scores of 94 or better in all academic classes in every quarter in fifth grade: Reading, English, Spelling, Social Studies, Math, Science, and Health. [Student] also obtained honors marks in all marking periods in Music, Art, and Physical Education with the exception of one marking period in Art. (P 6)
21. On the PSSAs in the spring of 2010, Student scored in the Advanced level in Mathematics and Reading, and in the Proficient level in Writing. (P 8)
22. Student never told any of [Student's] teachers that [Student] was bored with [Student's] educational program during the time period in question, or that [Student] wasn't challenged, or that the work was too easy. [Student] did, however, tell [the] parents that some subjects (Spelling, Social Studies, and Reading) were too easy. (N.T. 79-80, 116, 125, 131-33)
23. Student is currently in sixth grade and the GIEP team is in the process of completing a new GWR. (N.T. 90-93)

DISCUSSION AND CONCLUSIONS OF LAW

Although Pennsylvania's Chapter 16 governing the provision of gifted educational services is silent on the burden of proof, that burden lies with the party which initiated the request for due process, in this case the parents. *E.N. v. M. School District*, 928 A.2 453, 466 n.21 (Pa. Commw. 2007); *see also D.Z. v. Bethlehem Area School District*, 2 A.3d 712 (Pa.

this hearing officer destroy the document. Accordingly, this hearing officer's copy of P3 was destroyed, was not considered in this decision, and is not included in the official record of this case.

Commw. 2010).⁴ It is the responsibility of a hearing officer to make credibility determinations in assessing the weight to be accorded the evidence. *E.N.* at 461. This hearing officer found each of the witnesses who testified in this hearing to be generally credible and will discuss specific instances of such findings as necessary to the discussion below.

As noted, in Pennsylvania, the provision of gifted educational services is governed by Chapter 16 of Title 22 of the Pennsylvania Code. The regulations set forth therein provide, among other things, for certain procedural safeguards as well as an obligation on the part of school districts to identify and appropriately program for students who are gifted and need specially designed instruction beyond that which is provided in the regular education program. 22 Pa. Code §§ 16.1-16.65. Substantively, school districts must provide gifted students “with a plan of individualized instruction (an ‘appropriate program’) designed to meet ‘the unique needs of the child.’” *Centennial School District v. Department of Education*, 517 Pa. 540, 549, 539 A.2d 785, 789 (1988). However, a school district’s obligation “is not without limits... . The instruction to be offered need not ‘maximize’ the student’s ability to benefit from an individualized program.” *Id.* Further, school districts need not offer or provide gifted educational programming that goes beyond its own existing curriculum. *Id.* at 552-53, 539 A.2d at 791.

To meet its responsibilities under Chapter 16, a school district must determine a gifted student’s placement based upon individual needs, providing “appropriate specially designed instruction based on the student’s need and ability” and ensuring that the student “is able to benefit meaningfully from the rate, level and manner of instruction,” while providing opportunities in acceleration or enrichment or both as appropriate. 22 Pa. Code § 16.41. GIEPs must contain, among other things: (1) a statement of the student’s PLEPs; (2) a statement of annual goals and short-term learning outcomes which respond to the student’s needs as identified in the GWR; (3) a statement of the SDI and support services to be provided; and (4) appropriate objective criteria, assessment procedures, and timelines for gauging progress. 22 Pa. Code § 16.32(d). The District’s obligation is to provide a free, appropriate public education (FAPE). *See generally B.C. v. Penn Manor Sch. Dist.*, 906 A.2d 642 (Pa. Commw. 2006).

The District concedes that the September 24, 2009 GIEP is not perfect and lacks certain fundamental information. (N.T. 12-13, 23-28, 30-31, 47-49) Specifically, that GIEP contains very little information on Student’s PLEPs and omits any reference to achievement measures, grades, progress on goals, instructional levels, and also does not contain any description of Student’s aptitudes, interests, and specialized skills. (Finding of Fact (FF) 11) Also absent is any SDI for any of the annual goals. (*Id.*) The District further conceded that Student’s fifth grade GIEP was essentially the same as that for all fifth grade gifted students (FF 17) and, thus, is not individualized for Student. In short, the GIEP at issue clearly does not meet the requirements of Sections 16.32 and 16.41.⁵

⁴ The burden of proof is generally described as encompassing two elements, the burden of production and the burden of persuasion. *See E.N., supra*, at 466 n.21.

⁵ To its credit, the District recognizes the deficiencies in Student’s GIEP and has undertaken to address such omissions in the future. (N.T. 56-58)

This conclusion does not end the inquiry into whether Student was provided with an appropriate gifted education for the time period in question. Student's gifted teacher testified, credibly and in great detail, to the specific procedures she used to ensure that Student's program was individualized for [Student's] needs. (FF 17) As noted, she was in continuous contact with Student's other teachers to determine what areas should be either reviewed or further enriched during the pullout program. (*Id.*) She also conducted formative assessments which are part of Pennsylvania's standards aligned system, and are defined as "classroom-based assessments that allow teachers to monitor and adjust their instructional practices in order to meet the individual needs of their students."⁶ Further, this teacher created rubrics for specific assignments which were tailored to Student's individual needs for particular assignments as well as what [Student] was learning at the time, such as use of margins and supporting details in journal writing. (N.T. 71-72; FF 17)

The difficulty, however, is that without sufficient PLEP information, one is not able to determine whether Student's programming was based upon [Student's] needs and abilities, or how to objectively assess [Student's] performance. Our Commonwealth Court has instructed in *B.G. v. Abington School District*, ___ A.3d ___, 2010 WL 3929000 (Pa. Commw. 2010), that where parents agree with the goals, objectives, and assessment criteria in a GIEP, they cannot later argue that those elements of their child's program were insufficient. Even without a signed NORA in this case, the parents did not express any disagreement with Student's GIEP in September 2009 or throughout the 2009-10 school year. (FF 12) However here, unlike in *B.G.*, Student's GIEP did not contain goals which included "[a]ppropriate objective criteria, assessment procedures and timelines for determining, on at least an annual basis, whether the goals and learning outcomes are being achieved." 22 Pa. Code § 16.32(d)(5). (FF 8, 9, 11) *Compare B.G.* at **5-7. Also unlike in *B.G.*, Student's GIEP lacked any SDI. (FF 11) *Compare B.G.* at **5-7. Thus, in contrast to the decision in *B.G.*, this hearing officer cannot conclude that the District met the requirements set forth in 22 Pa. Code § 16.32(d)(5).

It is well settled in Pennsylvania that, "when a gifted child is denied a FAPE, compensatory education may be an appropriate remedy for the District's failure to provide an adequate educational program for the gifted child." *B.C.*, *supra*, at 648. Compensatory education is an equitable remedy tailored to the student's particular needs. *Id.* at 650. Further, in Pennsylvania, an award of compensatory education in cases limited to gifted programs is not necessarily calculated on a strict hour-for-hour calculation of the denial. Rather, "the student is entitled to an amount of compensatory education reasonably calculated to bring him to the position that he would have occupied but for the school district's failure to provide a FAPE." *Id.* at 651.

Student was provided with approximately one and one half hours per week of enrichment in the gifted teacher's classroom. (FF 16) As set forth above, the gifted teacher described in detail the strategies she used to provide individualized enrichment for all of her students. While it is impossible to determine the amount of meaningful educational benefit Student derived from that enrichment program during the relevant time period, I cannot conclude that [Student] did not benefit at all from [Student's] gifted program.

⁶ See <http://www.pattan.k12.pa.us/files/SAS/SAS-Fact-Sheet.pdf> (last visited November 27, 2010).

Student's parent testified that she believed Student should have been provided more challenging instruction in the areas of Mathematics, Social Studies, Reading, Writing, and Spelling, and should also have had an opportunity to take a foreign language. (N.T. 134-40) With respect to the foreign language, a school district is not required to provide gifted programming outside of its curricular offerings. *Brownsville Area School District v. Student X*, 729 A.2d 198, 200 (Pa. Commw. 1999). Thus, there can be no remedy for the absence of foreign language instruction since the District did not have such programming available during the relevant time period. (FF 10) With respect to Mathematics, Student's mother testified that she believed Student was appropriately instructed in this subject area (N.T.137-38), and the record supports this conclusion. (FF 14, 16; Parents' closing argument at 3) I therefore find no denial of an appropriate education to Student in the area of Mathematics. In Social Studies, the creative suggestion for Student to create [Student's] own study guides was approved by the parents and appeared to be quite appropriate for Student. (FF 19) There was also no evidence that Student had special ability in the area of Social Studies which required SDI, a conclusion supported by the fact that the GIEP fails to even mention this subject area.

Writing is the one area where Student's teachers provided encouragement and enrichment beyond the scope of the regular education curriculum. (FF 17, 19; N.T. 71-72) See *B.G.* at *7. Even without the requisite information in the GIEP, Student's gifted teacher credibly testified that Student worked on enrichment in writing at least two days a week (N.T. 62), and the teacher created individualized rubrics for Student's writing assignments (FF 17), sending them home on a regular basis. (N.T. 71-72) Thus, I cannot conclude that the District did not appropriately address Student's abilities and need for enrichment in this subject area. See *B.G.* at *7.

That leaves for consideration the question of compensatory education for Reading and Spelling. Student's GIEP addressed Reading Comprehension, Composition, and Linguistics, which should reasonably have addressed these two subject areas. As noted, without any objective criteria in the GIEP to determine how the District was meeting Student's needs for enrichment in these areas, or specific evidence thereof, it is impossible to ascertain the educational benefit. After careful consideration of the emphasis in Student's GIEP goals on Reading Comprehension, Composition, and Linguistics, and the time provided to Student weekly for enrichment activities in [Student's] GIEP,⁷ it is this hearing officer's estimation that appropriate gifted programming to Student in those subjects would have encompassed approximately one hour per week. I also find that that is the amount of compensatory education which would bring Student to the position [Student] would have occupied had Student received that amount of appropriate gifted programming in Reading Comprehension, Composition, and Linguistics. *B.C., supra*.

The compensatory education award of one hour per week shall be for the time period beginning October 26, 2009 and continuing through October 26, 2010, the date on which the

⁷ It merits repeating that, while Student's parents did ask at the September 2009 GIEP meeting whether Student could be provided with additional gifted programming, they did not expressly disagree with the amount of time specified for enrichment in the GIEP. (FF 10, 12) The Commonwealth Court in *B.G.* has made clear that parents' agreement with the content of a gifted program may preclude a later challenge to its sufficiency. *B.G.* at **6-7.

complaint was filed. Although there was little evidence presented about Student's sixth grade gifted program, it is apparent that Student began the 2010-11 school year with the same GIEP and gifted educational services. Thus, the award continues to the date of the filing of the complaint consistent with the opening statement of counsel. (N.T. 13) Because there are 36 school weeks within this one calendar year pursuant to Pennsylvania law (24 P.S. § 15-1501), Student will be awarded 36 hours of compensatory education.

The compensatory education hours must not be beyond the District's "existing, regular and special education curricular offerings." *Centennial, supra*, 517 Pa. at 553, 539 A.2d at 791. The parents may decide how the compensatory education hours should be spent so long as they take the form of appropriate developmental, remedial or enriching instruction that furthers the goals of Student's pendent or future GIEPs. Such hours must be in addition to Student's then current GIEP and may not be used to supplant such services, and may occur after school hours, on weekends and during the summer months, when convenient for Student and [Student's] parents. There are financial limits on the parents' discretion in selecting the appropriate developmental, remedial or enriching instruction that furthers the goals of the student's pendent or future GIEPs. The costs to the District of providing the awarded hours of compensatory education should not exceed the full cost of the services that were denied.

CONCLUSION

For the foregoing reasons, I conclude that the District denied an appropriate gifted education program to Student for the relevant time period, and that Student is entitled to compensatory education.

ORDER

Student is awarded 36 hours of compensatory education subject to the limitations and conditions set forth above.

Any claims or issues not specifically addressed in this decision and order are denied and dismissed.

Cathy A. Skidmore

Cathy A. Skidmore, M.Ed., J.D.
HEARING OFFICER

November 29, 2010
ODR 01714-1011JS