

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

Gifted Education Hearing Officer

DECISION

Child's Name: J. S.
Date of Birth: [redacted]
OPEN HEARING

ODR File No. 17229-15-16 KE

Parties to the Hearing:

Parents
Parent[s]

Local Education Agency
Mt. Lebanon School District
7 Horseman Drive
Pittsburgh, PA 15228-1107

Date of Hearing:
Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

Parent Attorney
Kristen C. Weidus, Esquire
Ruder Law Office
429 Forbes Avenue
Suite 450
Pittsburgh, PA 15219

LEA Attorney
Patricia R. Andrews, Esquire
Andrews & Price
1500 Ardmore Boulevard
Suite 506
Pittsburgh, PA 15221

April 22, 2016
April 27, 2016

May 13, 2016

Cathy A. Skidmore, M.Ed., J.D.
Certified Hearing Official

INTRODUCTION AND PROCEDURAL HISTORY

The student (hereafter Student)¹ is an early teenaged student in the District (District) who has been identified as mentally gifted under Pennsylvania Chapter 16.² Student's Parents filed a due process complaint against the District asserting that it denied Student an appropriate education with respect to Student's acceleration into a mathematics class. A due process hearing convened and concluded over a single session at which the parties presented evidence, four witnesses and a number of exhibits, on whether the District's provision of Student's mathematics acceleration was appropriate. After review of the record, and for the reasons set forth below, this hearing officer finds that the District's gifted program is appropriate for Student, but that it is required to provide additional transportation services.

ISSUE

Whether the District's manner of providing Student with an accelerated mathematics class is appropriate, or whether it should be directed to provide daily bus transportation to the building where that class is held?

FINDINGS OF FACT

1. Student is an early teenaged student who is a resident of the District. Student is mentally gifted within the meaning of Chapter 16. (Notes of Testimony (N.T.) 24)
2. The District is a walking school district, and does not provide transportation to students except where needed because of a disability. Parents are responsible for transporting their children to school. (N.T. 88-89)
3. The Parents are not concerned with Student walking to the middle school that Student attends. (N.T. 73-74)

¹ Although this was an open hearing, in the interest of confidentiality and privacy, Student's name and gender, and other potentially identifiable information, are not used in the body of this decision. 22 Pa. Code § 16.65.

² 22 Pa. Code §§ 16.1 – 16.65.

4. Student is properly accelerated in the areas of mathematics by placement in a geometry class at the District's high school. This geometry class is appropriate for Student. (N.T. 25)
5. When Student was in fifth grade and still in elementary school, Student was accelerated into a seventh grade mathematics class at a middle school. At times, there was miscommunication between teachers at the two schools as to whether elementary school students would be going to the middle school for acceleration on a given day if a special event were taking place. The District did provide bus transportation to and from the middle school. (N.T. 28-29, 37)
6. A meeting of Student's Gifted Individualized Education Plan (GIEP) team convened in May 2015. Student's GIEP provides, *inter alia*, for a two year acceleration in mathematics; and included a provision for bus transportation as a support service. An annual goal that includes specially designed instruction addresses Student's needs in mathematics. The participants discussed Student taking the high school mathematics class at the meeting, and the District representatives advised that it would not offer transportation to Student to the high school in the morning. (N.T. 27, 56-57, 59-60, 64, 74-75; Parent Exhibit (P-) 9)
7. The Parents expressed three concerns with the proposal for Student to be in the high school mathematics class: (a) Student having an understanding of days when Student was not to go to the high school; (b) Student missing instructional time; and (c) Student's transportation to the high school. The Parents left the GIEP meeting without having any of their concerns resolved to their satisfaction. (N.T. 28-34, 40-41, 60-61; P-2)
8. The GIEP team also discussed scheduling for Student's second period at the middle school since Student would be missing the very beginning of whatever class was held. The middle school principal rearranged classes so that all students in Student's grade as well as another grade would have team time (similar to a study hall) for half of second period, and a foreign language for the other half of second period. (N.T. 41, 101-04)
9. The District sent a Notice of Recommended Assignment (NORA) to the Parents in the middle of August 2015. The NORA indicated that Student would not be provided with transportation to the high school in the morning, but would be transported to the middle school after the mathematics class. (P-12)
10. The Parents and District further communicated about the Parents' concerns over Student attending the mathematics class at the high school. The Parents ultimately decided to let Student attend the high school mathematics class and see how well the District's plan worked. However, the Parents continued to have concerns and the team met again in October. (N.T. 34-40, 47-48, 61-62, 63, 89-90, 104-05)
11. In November 2015, following the October meeting and subsequent communications, the District sent a new NORA to the Parents reflecting that Student would not be provided transportation to the high school in the morning for the mathematics class. (P-7, P-8; School District Exhibit (S-) 5)

12. The District high school is approximately 1.9 miles from the family's home; Student's middle school is along the way, approximately 1.3 miles from the family's home. The high school and Student's middle school are approximately 0.4 – 0.6 miles apart depending on the route taken. (N.T. 66, 74, 100; P-13; S-10 pp. 3-4)
13. The District high school starts at 8:00 a.m. with first period beginning at 8:15 a.m. The middle school that Student attends starts just after 8:00 a.m. Student leaves home at approximately 7:00 a.m. and walks to the middle school with peers, then continues on to the high school. The entire walk to the high school takes Student approximately 40 to 45 minutes. (N.T. 48, 51-52, 57, 69, 111; P-10, P-11)
14. A number of crossing guards are stationed near the middle school and between the middle school and high school. Four crossing guards are assigned to the route that Student takes between the middle school and the high school. Additional crossing guards are stationed along other alternate routes between those buildings. (N.T. 69, 98-101)
15. A number of students from the middle school Student attends are accelerated into the high school mathematics class, two others in Student's grade and approximately ten in a different grade. The District provides bus transportation for those students from the high school to the middle school after the mathematics class has ended. Student walks home from the middle school with peers. (N.T. 25, 57, 92-93)
16. Student misses homeroom at the middle school, returning for the end of team time, then the second half of second period where Student has a foreign language class. Homeroom is a nine-minute period where attendance is taken and announcements are made. The homeroom announcements are also available on television screens during lunch periods, and to students and parents through a portal on the District's webpages. (N.T. 41-42, 45, 93-96, 103-06; P-6, P-10, P-11)
17. Student missed the first day of the high school mathematics class and some instructional time at the middle school during the first week, as did other students, due to bus schedules. A second bus was added the second week of school as a result. Since that second week of school, the bus to the middle school was late only five times as of the date of the due process hearing. (N.T. 38-39, 54, 83-84, 109-11)
18. There have been a few days when Student missed the high school mathematics class due to special events, and other days when Student missed the entire team time at the middle school. (N.T. 47-48, 52, 54; S-5 p. 1)
19. Student has the opportunity to visit the computer lab or engage in sports activities at the middle school until 7:50 a.m., and still have sufficient time to walk to the high school before first period. The computer lab is available to middle school students in the morning to complete an assignment or project with a teacher pass as needed. (N.T. 105-08)
20. If Student were to attend homeroom at the middle school then be transported to the high school, Student would miss at least five minutes of instructional time in the mathematics class. (N.T. 111-13)

21. Student attained all A grades for each marking period through the end of the third quarter of the 2015-16 school year. (S-9)

DISCUSSION AND CONCLUSIONS OF LAW

In Pennsylvania, the provision of gifted educational services is governed by Chapter 16 of Title 22 of the Pennsylvania Code. Procedural safeguards are included in those regulations, including the availability of a due process hearing following a disagreement under those provisions. Although Chapter 16 does not address which party bears the burden of proof when a matter proceeds to a hearing, case law instructs that the burden lies with the party initiating the request for due process, which in this case is the Parents. *E.N. v. M. School District*, 928 A.2d 453, 466 n.21 (Pa. Commw. 2007);³ *see also D.Z. v. Bethlehem Area School District*, 2 A.3d 712 (Pa. Commw. 2010). It is the responsibility of a hearing officer to make credibility determinations in assessing the weight to be accorded the testimonial evidence. *E.N.* at 461. This hearing officer found each of the witnesses who testified in this hearing to be generally credible, and notes that the testimony was remarkably consistent rather than discrepant among witnesses.

Chapter 16 contains 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

³ 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. In this matter, the Parents were assigned both.

(1988). More specifically, a school district must devise a program of “appropriate specially designed instruction based on the student’s need and ability,” and ensure 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. Nevertheless, 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.” *Centennial, supra*, 517 Pa. at 551, 539 A.2d at 791 (emphasis in original). 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.

Student’s Program

In this matter, the District has identified Student’s need for gifted programming in the area of mathematics, and the parties agree that acceleration into the high school class that Student currently attends is appropriate. That class is not offered at the middle school building Student attends, but Student has the class during first period for both schools. Student’s attendance at and return from the high school has been carefully planned so that missed instruction at the middle school is kept to a minimum and, except for a few minor instances, has been limited to non-instructional portions of Student’s school day. Student is performing quite successfully in this class with many older students who are intellectual peers but with a more experienced and mature perspective than the younger students in the class, such as Student.

Student, like many middle school students, travels to and from school with same-age peers. It is quite understandable that Student chooses to take the route to school that allows Student to spend time in the morning socializing with other middle school students. Student has been able, evidently easily and willingly, to walk the relatively short distance beyond the middle

school to the high school for the mathematics class each morning, arriving before the high school day begins. Through this routine, the length of Student's school day is no more or less than the peers with whom Student walks to and from school.

The Parents expressed two main concerns with the arrangement that does not include bus transportation from the middle school to the high school. The first, and perhaps more important, is Student's safety, with the possibility of Student being exposed to questionable activities by older students in and near unsupervised areas of the high school grounds. Concern over their child's well-being is certainly reasonable and understandable, particularly where, as here, Student is necessarily in and around the company of older children on a daily basis. However, other than a vague sense of unease, the Parents pointed to nothing concrete to suggest that Student might be unsafe traveling to, or inside, the District high school. This is a school district where the vast majority of students walk to school, with crossing guards stationed at specified points along various routes to allow for safe travel of all students to and from the high school. There is no evidence in the record that the District does not adequately monitor its campus, or that Student has been placed in any situation that would indicate that Student's welfare has been compromised in any manner. Indeed, noticeably absent from the record is any suggestion that Student has been left unsupervised, or has been prone to engage in inappropriate activities on the way to or upon arrival at the high school. Without minimizing the Parents' genuine concern for Student's well-being, the evidence does not establish that the District's transportation arrangement is inappropriate for Student on this basis.

The next concern is that Student is missing out on morning social opportunities, announcements, and access to the computer lab at the middle school. The record establishes, however, that Student and the Parents have access to the middle school announcements through a

variety of media. Student is also able to go directly into the middle school in the morning to take advantage of activities and the computer lab without missing the high school mathematics class. Conversely, should Student go to homeroom at the middle school and then be transported to the high school, Student would miss instructional time on a daily basis in one of the areas which Student has been identified as needing specially designed instruction in the GIEP. It is likely unavoidable that Student would miss some portion of the middle school day in order to allow for attendance in the high school mathematics class; and, the District's election to plan Student's schedule so that the time missed is non-instructional and achieved with limited interruption is eminently reasonable and, in this hearing officer's estimation, entirely appropriate.

The above two concerns serve as the basis for the Parents' first choice in terms of remedy: they would like to see Student's high school mathematics class offered and provided at the middle school. The District counters that a similar argument was rejected by another hearing officer in *T.G. v. Abington School District*, 1806-10-11 AS (Lochinger, September 7, 2011). This hearing officer finds the reasoning in *T.G.* to be persuasive on this contention. Here, as in *T.G.*, the Parents challenged the location of a class for a gifted student and sought to have a teacher's duties reassigned so that he or she could teach the class in the other school building. Similar to *T.G.*, there is no evidence in this case that a qualified teacher is able and available to do so. Furthermore, as former Hearing Officer Lochinger cogently explained, "the District has no obligation to move a perfectly legitimate and acceptable program," *id.* at 10, absent a showing that the existing program as implemented is inappropriate. Moreover, removing Student from the high school class would eliminate the ability to engage with many intellectual peers. For all of these reasons, this hearing officer concludes that implementing Student's program through the mathematics class provided at the high school is appropriate.

Notwithstanding the foregoing, the Parents' most compelling argument supports their second proposed remedy, that the District provide transportation to Student from the middle school to the high school, relying on the decision of the Commonwealth Court in *Woodland Hills v. Department of Education*, 101 Pa. Commw. 506, 516 A.2d 875 (1986), and applicable provisions of the Public School Code. In *Woodland Hills*, the Court was called upon to interpret a school district's obligation to provide transportation to gifted students. The district had previously provided transportation to public and nonpublic school students for gifted services and instruction in one of its buildings. When the school district made changes to its program such that gifted education was provided in all of its schools, it no longer offered or provided transportation to the nonpublic school students for gifted instruction. The Court concluded that Section 1374 of the Public School Code was controlling:

Any exceptional child,⁴ who is regularly enrolled in a special class that is approved by the Department of Education, or who is enrolled in a regular class in which approved educational provisions are made for him, may be furnished with free transportation by the school district. When it is not feasible to provide such transportation ... the intermediate unit shall provide the transportation necessary.

Id. at 513, 516 A.2d at 878 (quoting 24 P.S. § 13-1374).⁵ The Court rejected the school district's contentions that it was only required to provide the same transportation to the nonpublic school students that it provided to public school children, and that its obligations regarding transportation were limited to those circumstances where such a need arose from the child's exceptionality itself. *Id.* In a footnote construing Section 13-1362 (containing a limitation on the provision of transportation), the Court also explained that no transportation or board and lodging would be required if "the distance involved is less than one and one-half mile and is not

⁴ An "exceptional child" includes a child who is mentally gifted. 24 P.S. § 13-1371.

⁵ The Commonwealth Court has interpreted this provision to require transportation services, not merely permit them. *Pires v Department of Education*, 78 Pa. Commw. 127, 135, 467 A.2d 79, 83 (1983).

along a hazardous route.” *Id.*, 101 Pa. Commw. at 512 n. 9, 516 A.2d at 878 n.9. It is also noteworthy that the language of Section 13-1362 relates to “total distance,” thereby removing from possible consideration the fact that the high school and middle school that Student attends are less than 1.5 miles apart.

It is, perhaps, arguable that the result in *Woodland Hills* rested in part on the fact that the nonpublic school students would not have a means of receiving any gifted education services if the school district did not transport them without imposing a duty on the parents, a circumstance not present in this case because Student has been able to travel to and attend the high school mathematics class on Student’s own. Regardless of any distinctions that may be drawn between this matter and *Woodland Hills*, however, this hearing officer must agree with the Parents that the Commonwealth Court’s interpretation of a school district’s obligation to transport students who are gifted is binding in this case, and unmistakably obligates the District to provide transportation to Student to the high school, a distance of 1.9 miles from Student’s home, so that Student may be provided the accelerated mathematics class that is part of Student’s GIEP.

Accordingly, the District will be required to arrange for and offer transportation to Student in the morning from the middle school Student attends to the high school prior to the start of the first period accelerated mathematics class. The District will not, however, be directed to also permit Student to attend homeroom in the middle school, because doing so would result in Student missing instructional time in an area where Student requires specially designed instruction under the GIEP. Student and the Parents already have other available means to access announcements that should eliminate any perceived need for Student to attend homeroom at the middle school.

This hearing officer recognizes that there may be unintended results in requiring the District to offer transportation to Student in the morning; for example, depending on how the arrangements may be made as a practical matter, Student may no longer have the opportunity to utilize the computer lab in the mornings for the same amount of time that other middle school students may do so, should Student need such access. It is important to also recognize that the District does not provide bus transportation to all of its students and that its options may be somewhat more limited than those of a school district that does have such services already in place. Once the transportation arrangements are identified, the GIEP team should plan to meet to consider how to ensure Student's ability to access all areas of Student's regular and gifted educational program. Finally, in light of the very short period of time remaining before the end of the 2015-16 school year, the team should also consider Student's own perspective on making such a change at this time.

CONCLUSION

Based on all of the foregoing, the District will be ordered to provide transportation to Student from the middle school to the accelerated mathematics class at the high school.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. Within ten calendar days of the date of this Order, the School District shall offer, and make available, transportation from the middle school and to the high school first period accelerated [mathematics] class to Student as part of the gifted program.
2. The District is not required to take any further action.

It is **FURTHER ORDERED** that any claims not specifically addressed by this decision and order are denied and dismissed.

Cathy A. Skidmore

Cathy A. Skidmore
HEARING OFFICER

Dated: May 13, 2016