

*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

FINAL DECISION AND ORDER

Student's Name: D.V.

Date of Birth: [redacted]

ODR No. 20107-17-18 KE

OPEN HEARING

Parties to the Hearing:

Representative:

Parent[s]

Steven Yarnell, Esq.  
1101 Evergreen Road  
Reading, PA. 19611

Conrad Weiser Area School District

Shawn Lochinger, Esq.  
Sweet, Stevens, Katz & Williams  
331 Butler Avenue  
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Dates of Hearing: 02/28/18

Record Closed: 03/26/2018<sup>1</sup>

Date of Decision: 04/10/2018

Hearing Officer: Vicki A. McGinley, Ph.D., HO

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<sup>1</sup> The record closed upon receipt of written closing briefs from the parties.

## **Introduction**

Parent requested this due process hearing on behalf of the Student, raising claims against the District (District) under Pennsylvania's gifted education regulations, 22 Pa. Code § 16 et seq. (Chapter 16). The District concedes that the Student is gifted and has proposed a Gifted Individualized Education Plan (GIEP) that offers specifically designed instruction (SDI) and acceleration to first grade for reading and math. The Parent alleges that the GIEP that the District offered is inadequate to meet Student's needs and that acceleration should be full time into the first grade rather than half time kindergarten, the Student's chronological age grade class, with acceleration for reading and math in the first grade.

For reasons discussed below, I find in favor of the District.

## **Issues**

1. Is the 2017/18 GIEP that the District proposed for the Student appropriate?
2. Should the Student be accelerated full time into the first grade rather than half time in the kindergarten and accelerated into the first grade for reading and math?

## **Findings of Fact**

1. The Student is a [pre-early elementary school-aged] child who resides with Parent and [other relatives] within the District.
2. District screening of all kindergarten students begins in October. Evaluation Input Documents to include the Gifted Scale for Acquisition and the SIGS (Scale for Identifying Gifted Students) completed by the kindergarten teacher indicated that this identified Student enjoyed learning, was eager to talk to adults and was more accelerated in math and reading. NT 191, S4

3. The Parent and [another relative] testified that the Student has been extensively home schooled by [the relative] since the age of 1 and therefore exhibits behaviors as a result of boredom due to lack of academic challenge in the school setting since starting school in PreK and continuing into the present placement. P1, P2, P3, NT 47, NT 51, NT 61, NT 80, NT 109
4. The Parent requested early entrance for Student into kindergarten which was denied due to District policy. Thus, Student was enrolled in the District at the beginning of the 2017-18 school year as a kindergarten student with chronologically same aged peers. P4, NT 136
5. The Parent requested acceleration at the start of the Student's kindergarten year, August 28, 2017. P5, NT 55, NT 136
6. A note that the Student's [relative] typed, but that Student indicated was dictated to the grandmother, was entered into evidence, and indicated that kindergarten children bullied Student, but the first-grade students did not. In cross examination, Student indicated that teachers were not notified of any bullying and that bullying may have occurred one time. The teachers testified to not observing any bullying or hearing of any bullying until the due process hearing. NT 30-38, NT 73, NT 149, NT 182. NT 213
7. Testimony from Student's [relative] indicated that the Student knows all of the material in first grade math but that Student liked being around older children. NT30, NT 34-35, NT 73, NT 149, NT 182. NT 213

8. The Parent's testimony throughout indicated that the Student was "bored" and that behaviors such as placing head down [redacted] in the school and home were a result of lack of academic challenge. The kindergarten teacher testified that any noted behaviors began upon acceleration to first grade [for some subjects] but have decreased and do not rise to level of impacting Student's education or the education of other children. Additionally, the kindergarten teacher reported that some observed behaviors indicated a disinterest in areas that Student struggles with such as writing. The first-grade teacher testified that Student is very cooperative but inattentive at times when not receiving attention. NT 92, NT 156, NT 199, NT 253
9. Testimony from the Parent indicated that the Student was "locked out" of certain school sanctioned technology, such as the IXL and Prodigy programs and thus opportunities for acceleration by District were denied. The District testified that the Student can accelerate on programs beyond the first grade in some programs but others would require entrance into gifted education. NT 53, NT 77, NT 82. NT 119, NT 24, NT 317
10. The Parent requested a Gifted Multidisciplinary Team Evaluation (GMTE) on September 19, 2017, a Permission to Evaluate Form was sent on that same date and was signed by Parent on September 30, 2017 and received by the District on October 2, 2017. S3, P9, NT 95, NT 294
11. The Parent and District met over the course of Student's present academic year on a number of occasions to discuss Student's academic needs, evaluation, present and proposed GIEP. S5, P6, NT 55, NT56, NT 128, NT 149, S5

12. The Student was accelerated into the first grade for math and reading on October 30, 2017, prior to completion of the completion of Gifted Written Report (GWR). NT 19, NT 51, NT 189, NT 197, NT 246, NT 314
13. The GWR was completed and was issued on November 30, 2017 within the time period required for completion. P20
14. The Instructional Coach administered assessments in reading and math, specifically a Directed Reading Assessment (DRA), three additional assessments, benchmark assessment and Aimsweb. Results from data from the Fountas and Pinnell Literacy program confirmed Level H, but challenges with phonemic segmentation. According to the Instructional Coach the Student is appropriately placed in half day kindergarten and in first grade for reading and math. S8, NT 277
15. The School Psychologist tested the Student at a full-scale IQ of 131. Subtests indicated strength in verbal information, above average listening comprehension skills, reading skills and oral expression, and superior math problem solving skills. The Student's overall cognitive ability was found to be superior to kindergarten same age grade peers, and the recommendation was confirmed for acceleration into first grade for reading and math. P20
16. The GWR indicated that Student was academically gifted in some areas, but developmentally at [the] chronological age in writing and thus was in need of continuing to develop fine motor and writing skills which are best addressed in kindergarten. Additionally, it was noted that the Student may be in need of modifications to first grade work that allow the Student to demonstrate foundational skills at mastery. NT 88, P20

17. Testing indicated that Student's reading was at the second-grade level, with comprehension at the first-grade level. Math skills were at the first-grade level. NT 149
18. Grades on the Student's first marking period report card indicated a range of 1s to 3s with 3s being the highest rating. S10
19. The kindergarten teacher testified that the Student is appropriately placed in half day kindergarten and first grade for reading and math, and has areas of need in writing, and phonics. NT 201
20. The Student's first grade reading teacher testified that the Student is appropriately placed in half day kindergarten and first grade for reading and math, is a fluent reader but needs support with re-telling details from the Fountas and Pinnell Level F-H reading system (level E is the end of kindergarten), and comprehension questions remain challenging for the Student at this level (NT 226).
21. The Student's first grade math teacher testified that the Student is quick in computation skills but has challenges with the written component of tasks and needs prompting for independent work. NT 250
22. As a result of the Student's GWR a draft GIEP was developed and proposed which offers acceleration in math and reading, access to the gifted classroom teacher and specially designed instruction that included the STEAM<sup>2</sup> (Science, Technology, Engineering and Math) program. NT 20, NT 113, P16, NT 203

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<sup>2</sup> S.T.E.A.M. stands for Science, Technology, Engineering, the Arts and Mathematics and is an enrichment program only offered to District gifted elementary students. [redacted]

23. The Parent rejected the draft GIEP presented on December 22, 2017. NT 20; NT 117, P236

24. On January 1, 2018, the Parent filed a request for Due Process to the District. NT 161, P24

## **Legal Principles and Discussion**

### **Burden of Proof**

Although Chapter 16 does not speak to the burden of proof in gifted due process proceedings, it has been clearly determined that said burden lies with the party which initiated the request for due process. *E.N. v M. School District*, 928 A.2d 453 (Pa. Commw. 2007). As such, in this case, the burden of proof lies with the Parent. The sole issue of this hearing is whether or not the Student should be fully accelerated to the first grade rather than the present placement of half day with chronological age kindergarten peers and acceleration to the first grade for reading and math. There were a number of other issues brought out in this due process hearing, such as Parent's claim that the District refused to consider parental input in the proposed GIEP development process, that Student was being locked out of certain technology applications, as well as claims of bullying. Although it is clear that these issues were not the main issues that brought Parent to due process on behalf of the Student, as they are referenced numerous places within the transcript, and seem to be the issues of which Parent spent most time testifying on, I will address them within this decision.

### **Gifted Student**

As indicated, above, the District and Parent agree that the Student is a gifted student (full-scale I.Q. of 131) as defined by Chapter 16. In Pennsylvania, gifted students are entitled to gifted education, provided in accordance with a GIEP, "which enables them to participate in

acceleration or enrichment programs, or both, as appropriate, and to receive services according to their intellectual and academic abilities and needs”. 22 Pa. Code § 16.2(d)(3). The term “gifted student” is defined by Chapter 16 at 22 Pa Code § 16.1. Under that definition, a student is a gifted student if two criteria are met: First, the student must be “mentally gifted” and, second, the student must also need “specially designed instruction beyond that required in Chapter 4 (relating to academic standards and assessment)”. If a student is mentally gifted, the second prong of the test is whether the Student requires Specially Designed Instruction (SDI). That question is presented relative to Chapter 4, indicating that the student must need something beyond what can be provided through regular or general education. This is also indicated in Chapter 16’s definition of SDI: “Adaptations or modifications to the general curriculum, instruction, instructional environments, methods, materials or a specialized curriculum for students who are gifted”. 22 Pa Code § 16.1.

Since the Gifted Multidisciplinary Team (GMDT) agreed that the Student was gifted, by definition Student would need to receive SDI as defined above. SDI would be incorporated within Student’s GIEP. “A GIEP is a written plan describing the education to be provided to a gifted student. The initial GIEP must be based on and be responsive to the results of the evaluation and be developed and implemented in accordance with [Chapter 16].” 22 Pa. Code § 16.31. Chapter 16 includes a host of procedural requirements for GIEPs and their development. 22 Pa. Code § 16.22.

Most of the Parent’s testimony during this one-day due process hearing centered on claims that the District was intentionally shutting the Student out of technology, denying parental

participation in the evaluation and GIEP process and meetings, ignoring bullying and underestimating Student's abilities. However, the Parent's burden of proof lies with showing whether or not the Student's proposed GIEP was inadequate to address the Student's needs. In this case, the Parent claims that the proposed GIEP does not offer the level of acceleration to address Student's needs and believes that the proposed program within the GIEP and the resulting Notice of Recommended of Assignment (NORA) should be acceleration to full time first grade was not met. During testimony Parent did not disagree with any specific goals and SDIs on the proposed draft GIEP. Parent's claims were solely that the proposed GIEP underestimates the Student's abilities and that only full time acceleration would meet Student's educational needs. This was disputed by all credible District witnesses to include the School Psychologist, kindergarten and first grade teachers, and an instructional coach. Reference to placement outside of the District is not addressed as a remedy as it was not part of the original complaint and thus is not addressed.

### **Gifted Evaluation/GIEP**

The Parent's claim that there was no opportunity for input to the proposed GIEP was unfounded. Parents are members of GMDTs and GMDTs must consider parental input. 22 Pa. Code § 16.22(d), (f). Parents are also mandatory members of GIEP teams, and schools must make efforts to ensure parental attendance. 22 Pa. Code § 16.32(b)(1), (c). The language concerning parental participation in the GMDT and the GIEP team is different. Chapter 16 affirmatively requires LEAs to consider Parental input as part of the evaluation process (GMDT). The same language is not included when it comes to actually drafting the GIEP. There, the focus is on getting the Parent to the meeting. It would make little sense, however, to make parents part of the GIEP

team if they have no voice in GIEP development, but the differences in these parts of Chapter 16 are striking. Ultimately, I find that the Parent was given a meaningful opportunity to participate in the GIEP development process. Meaningful parental participation is not evidenced by acquiescence to parental demands. From close to the very beginning of the school year, while the evaluation process was taking place, there is evidence that the GMDT, of which Parent is a member, met on several occasions. As noted, prior to completion of the GIEP, the District, with consent from Parent began acceleration of the child to first grade for reading and math.

Although this case is not questioning the timeline, all Districts have a designated age of start for students entering and screening in kindergarten, and even though Parent sought evaluation and acceleration prior to the start of Student's kindergarten 2017/18 year, the District has the right to evaluate children appropriately and within the regulated timeline for placement as governed by 22 Pa. Code §16.22G. The Student's GWR was completed within the time period required for a gifted evaluation. Specifically, the Chapter 16 regulations require that an initial evaluation be completed no later than 60 calendar days after the District receives written parental content for an evaluation. The District's calendar shows the first day of school for students as August 28, 2017. Close to the start of school, the District initiated the process of starting a formal gifted evaluation for the Student as noted above. The District is commended on the speed in which they addressed this Student's needs, beginning the evaluation process and accelerating the Student prior to the completion of the GWR.

The Parent points to the District's refusal to incorporate revisions to the GIEP. Yet, as indicated above, there was no testimony from Parent on specific revisions deemed necessary to be

incorporated within the GIEP. It is clear from testimony of the kindergarten and first grade teachers that the District's refusal comes from its belief that the GIEP is appropriate to meet Student's needs. What is clear (from the record as a whole) is that the District had a detailed understanding of what the Parent wanted, and affirmatively decided to partially reject those demands. The Parent attended the noted GIEP meeting and many meetings leading up to this meeting. Even though the Parent indicated that [the family was] "not heard" at the GIEP [meeting], the record is clear that this is not the case. The record indicates that the Parent had an opportunity to present input. The District's rejection of the Parent's demands does not indicate a lack of parental participation.

As already indicated, the dispute is on the proposed GIEP [which] focuses on full acceleration into the first grade. Parent bears the burden of proof in this matter as to whether or not the proposed GIEP, which incorporates SDI in academic areas, acceleration into first grade for reading and math, as well as enrichment, with specific reference to the S.T.E.A.M. program is appropriate to meet Student's needs.

All witnesses for the District were credible. The first-grade teachers testified that math is forty (40) minutes per day and reading is one hour per day. Both the kindergarten and first grade teachers indicated that the Student was appropriately placed and was making meaningful progress. However, although the Student was making meaningful progress, all teachers indicated a need for the Student to develop foundational skills, specifically in the area of writing, but also in the area of phonics, specifically phonemic segmentation, as well as comprehension at the level Student is reading at, which is a first-grade level in the Fountas and Pinnell curriculum.

There was additional concern by all District witnesses of the Student potentially missing foundational common core skills. All teachers indicated that writing was a struggle for Student and that Student's written products are not comparable to other chronologically aged children.

Other issues brought out in this due process hearing related to bullying and denial of technology were not properly pled. The testimony indicated that District witnesses had not heard about bullying or observed any episodes of bullying in either the kindergarten or first grade classrooms. Additionally, the Student admitted that bullying may have happened once, and when asked if teachers would help in a bullying matter, the Student affirmed that the teachers would help. As for Parent's claim that technology was denied, testimony from District witnesses, to include the Principal, indicated that except for a program that is only licensed by the District for second grade students (and older) or those who have GIEPs and where technology is deemed appropriate, Student has access to all appropriate questioned technology at this time. Additional technologies (e.g., IXL) if deemed appropriate, would potentially be assigned with approval of the GIEP and NORA.

In this case, the Parent has not proven that the Student's program is inappropriate and thus, has failed to bear the burden of proof. There was no evidence presented to show that the Student would be more appropriately placed into first grade on a full-time basis.

## **ORDER**

Now, April 10, 2018, it is hereby ORDERED as follows:

1. The proposed GIEP is otherwise appropriate.

2. If the Parent approves the GIEP, or fails to respond in accordance with this Order, the District shall implement the GIEP.
3. If the Parent rejects the GIEP, the District shall not implement the GIEP, and shall bear no liability for failure to provide gifted education to the Student until the end of the term of the proposed GIEP, had it been accepted.

It is FURTHER ORDERED that any claim not specifically addressed in this order is DENIED and DISMISSED.

/s/ Vicki A. McGinley, Ph.D.

HEARING OFFICER