

This is a redacted version of the original hearing officer decision. Select details may 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 ODR #6635/05-06

Due Process Hearing

For

A.F.

Date of Birth: xx/xxx/xx

Date of Hearing: July 19, 2006

Open Hearing

Parties to the Hearing:

Parent(s)

East Penn School District
800 Pine Street
Emmaus, PA 18049

Representative:

Mark Voight, Esquire
Plymouth Meeting Executive Campus
600 West Germantown Avenue, Suite 400
Plymouth Meeting, PA 19462
mwvoight2@aol.com

Marc Fisher, Esquire
Worth Magee & Fisher Law Offices
515 Linden Street
Allentown, PA 18101
worthlaw@fast.net

Transcript Received: July 26, 2006

Date of Decision: August 1, 2006

Hearing Officer: Max Wald, Ed.D.

Background

Student (hereinafter Student or Student) is a [pre-teenaged] student living with Parents (hereinafter Parents) within the School District (hereinafter District).

On May 6, 2005 the District received a “Parent Request for Gifted Screening” from the Parents.

The District completed a screening matrix for admission to the Gifted Program. The “Matrix” required a total of 116 points in order to qualify for proceeding with the screening. The Student earned 119 points.

The Parent signed the “Permission to Evaluate” form on 6/10/2005 and the process was completed 11/15/2005 with a conclusion that because the Student possessed cognitive ability within the high average range and overall achievement ranging from average to very superior he did not display a pattern of characteristics consistent with those of gifted learners.

The Parents rejected the findings and requested mediation which was subsequently withdrawn. The Parents obtained an Independent Educational Evaluation which in their view obtained more favorable results. After failing to reach an agreement with the District the Parent requested a due process hearing.

The Parents are seeking the identification of their son as a gifted student, compensatory education for the 2005-2006 school year and reimbursement of their expenditure for an independent educational evaluation.

Issues

1. Does the Student meet the definition of mentally gifted as described in Chapter 16 of the Pennsylvania Code?
2. Did the District provide the Student with an appropriate program for the 2005-2006 school year?
3. Is the Parent entitled to reimbursement for the independent educational evaluation administered to the Student?

Findings of Fact

1. Student is a [pre-teenaged] 4th grade Student residing with his parents within the School District. (S-4 at 1)

- The Student was administered the Wechsler Intelligence Scale for children – 4th edition (WISC-IV) on 11/3/2006 at age 8-6. Student achieved scores as follows:

	SS	National %ile
Verbal Comprehension	108	70 th
Perceptual Reasoning	123	94 th
Working Memory	116	86 th
Processing Speed	109	73 rd
Full Scale IQ	119	90 th

This places the Student in the high average range. (NT212-214, S-4 at3)

- The Student was evaluated using the Wechsler Individual Achievement Test 2nd Edition (WIAT-II) on June 10, 2005 at age 8.1. The Student earned a 77% ile composite Reading Score and a 99.7%ile Mathematics Composite. Written expression was at the 55th%ile. (S-4 at 6, 8)
- The Renzulli/Hartman Rating Scale (evaluates giftedness) completed by the Student’s 2nd grade teacher placed Student in the gifted range in two of the four categories:

		Needed for Giftedness
Learning Characteristics	20/32	24
Motivational Characteristics	23/36	27
Creative Characteristics	30/40	30
Leadership Characteristics	30/40	30

(S-2, S 4 at 7)

- The District concluded that there are no intervening factors which would have masked gifted abilities, documented, observed, validated, or assessed. (S-4 at 8)
- Student has strong creative abilities and leadership characteristics as seen by his 2nd grade teacher, a view that was not shared by his 3rd grade teacher. (NT 42-43, S-4 at 9)
- Students in Student’s class are “pulled out” for the main portion of each day for differentiated instruction that focus on their strengths and needs in Mathematics. The Student was in the math enrichment level with like learners. Language Arts instruction was grouped within the class and Science and Social Studies were taught as a whole class. (NT 27-28, 63-64)
- During one marking period the Student was below “A” level in Mathematics but increased his performance after a teacher-parent contact. (NT 33)

9. More than 50% of the Student's classmates were below grade level upon entering the third grade in September 2005. The consensus of staff was that the Student was misplaced in this class. (NT 29, 48, 56, 297-298)
10. The Student participated in the "Math Olympiad," a competitive 5th grade math program open to fourth graders and a limited number of third graders. (NT 34)
11. Student did not want to stand out in the classroom. He did not want to take risks. He wanted to do what he needed to do in order to get things done. He was sometimes intimidated by other students. (NT 44, 92)
12. The third grade gifted program consisted of one hour of in class work per week with the Student and one hour of pull out work per week with the Student. The area of focus was language arts. (NT 49, 80)
13. Student received all A's on his report cards from first through third grades. (NT 58, 178, 304, P 10 at 66-70)
14. The Student participated in an independent evaluation on March 30, April 1 and April 7, 2006. The evaluation sessions were followed by a Parents conference on April 11, 2006. (S-99, P-1 at 5-16)
15. The Stanford -Binet Intelligence Scale, 5th Edition was administered on 1/5/06 and resulted in scores as follows:

Nonverbal IQ	134
Verbal IQ	125
Full Scale IQ	130

The full scale score is in the "very advanced or gifted range of functioning"
(NT 104, 119, P-1 at 6)
16. The Student's scores in the Woodcock Johnson Tests of Achievement – Third Edition range from the 26% ile for Story Recall to the 98%ile in Applied (Math) Problems. Composite scores range from the 56%ile in Oral Expression to the 99%ile in Broad Math and are generally equivalent to those students in grade 4 or higher. (NT 109-110, P-1 at 7)
17. Reading Comprehension scores obtained in the Gray Oral Reading Tests place the Student in the 84%ile in reading comprehension, consistent with 6.0 grade equivalent. All other reading scores were in the 91%ile and also a grade 6 equivalent. Mathematics scores ranged from the 84%ile to the 99%ile with 5.2 to 10.0 grade equivalents. (NT 111-112, P-1 at 8)

18. Scores on the Test of Memory and Learning (TOMAL) Verbal Subtests ranged from the 2%ile in “Word Selective Reminding” to the 50%ile in “Paired Recall.” These low scores, for a student of high ability raise concerns about the possibility of auditory and/or visual processing difficulties. Nonverbal subtests ranged from the 2%ile to the 95%ile. Composite scores ranged from 10%ile to 42%ile. (NT 115-116, P-1 at 6)
19. A re-administration of the Wechsler Intelligence Scale for Children – 4th Edition (WISC-4) resulted in scores similar to the District’s with the Full Scale IQ moving from 119 IQ to 126 IQ. This test was administered within six months of the first test. (NT 117, 135, P-1 at 8)
20. The 3rd grade program offered to the Student was reasonably calculated to yield meaningful educational progress. (NT 128)
21. The Student exceeded the Benchmark score of 116 needed for further consideration by the District for inclusion into the Gifted Program. (NT 161, 265, S-3)
22. On January 8, 2006 the Parents rejected the Notice of Recommended Assignment (NORA) which indicated that the Student was not in need of gifted education. (NT 169, 252, 281, S-6, S-9)
23. The IEE was not formally considered as part of the consideration of the decision on the giftedness of the Student because it was received after the initial decision had been made by the team. (NT 172-173, 183, 188)
24. The District views both the WISC – 4 and The Stanford-Binet as respected psychometric instruments, but chose one over the other because of the “nice alignment” with the WIAT. (NT 173)
25. Most of the determination of the Student’s lack of giftedness characteristics was based on the WISC-IV IQ score. (NT 216, 279)
26. The Student’s IEE will be formally considered by the District as part of a future evaluation but not as part of the current evaluation. (NT 244)
27. The District requested a mediation session on behalf of the Parents to take place in March, 2006. The request was subsequently withdrawn by the Parents on March 27, 2006. (NT 255, S-10)
28. Audiometric studies conducted on June 2006 show the Student to have hearing sensitivity that was within the range of normal through 4 kHz with a mild to moderate high frequency sensorineural hearing loss between 6k and 12 kHz, bilaterally. (P-5 at 24)

29. The Student was identified in June 2006 as having “auditory processing deficits that will further contribute to problems with processing spoken language in noise, with understanding the speech of those who speak rapidly, and with auditory overload (difficulty processing ongoing spoken language).

Discussion and Conclusions of Law

Definition of Mentally Gifted

Mentally gifted is defined as outstanding intellectual and creative ability the development of which requires specially designed programs or support services, or both, not ordinarily provided in the regular education program. (22 Pa. Code §16.1)

Intellectual ability is not equated with an IQ score alone. Intellectual ability is and should be a reflection of a range of assessments including a student’s performance and potential.

IQ 130 or more

The term “mentally gifted” includes a person who has an IQ of 130 or higher, when multiple criteria as set forth in Department Guidelines indicate gifted ability. Determination of gifted ability will not be based on IQ score alone.... The determination shall include an assessment by a certified school psychologist. (22 Pa. Code §16.21(d))

No one test or measure is sufficient to determine giftedness, and the evaluation and testing literature recognizes that there is a margin for error in any standardized testing. The standard error of measurement also applies when reporting IQ.

IQ Lower than 130

A person with an IQ score lower than 130 may be admitted to gifted programs when other educational criteria in the profile of the person strongly indicate gifted ability. (22 Pa. Code §16.21(d))

If a student’s IQ is less than 130, other factors, such as academic performance, demonstrated achievement and other observed skills must strongly indicate gifted ability in order for that student to be admitted to a gifted program. Because disabilities and bias factors may mask gifted abilities, districts are cautioned to examine discrepancies between ability assessment results and academic achievement or demonstrated skills, and discrepancies among ability subtests.

The above referenced material is taken from the Pennsylvania Department of Education Gifted Guidelines, 2004.

The hearing regarding the Student dealt with a child entering 4th grade in September 2006 who had been denied admission to the School District's "gifted program" because he did not in the estimation of the GIEP team possess the characteristics of a gifted student. Though the team presented considerable evidence to this effect to support its position, they did not have in their possession all of the information available at the time of the hearing. This evidence, available at the hearing, is utilized in arriving at this decision.

This Hearing Officer has determined that the Student possesses a sufficient number of the characteristics of a Gifted Child, as outlined in Chapter 16 of the Pennsylvania Regulations, to be included in the program for mentally gifted students.

There are several areas in which the Student has shown considerable ability and achievement. Chief among them is his demonstrated ability in Mathematics. The District's evaluation using the WIAT-II showed him to have a percentile rank of 99.7 in the Mathematics Composite. This implies that few than .3 % of the children taking this test have a higher score than this Student. (S-4 at 6) This ability in Mathematics should be addressed beyond the realm of the regular curriculum.

§ 16.21. General.

(3) Demonstrated achievement, performance or expertise in one or more academic areas as evidenced by excellence of products, portfolio or research, as well as criterion-referenced team judgment.

In addition, Composite Scores in the Woodcock Johnson Test of Achievement-Third Addition showed the Student to be achieving two or more years above grade level in almost 12 of the 15 test areas noted (P-1 at 7). These scores were supported by the all "A" report cards received in grades one through three.

§ 16.21. General.

(1) A year or more above grade achievement level for the normal age group in one or more subjects as measured by Nationally normed and validated achievement tests able to accurately reflect gifted performance. Subject results shall yield academic instruction levels in all academic subject areas.

Much, as it should, has been made by the District of the "deficient IQ score attained in its evaluation of the Student. The generally accepted IQ score of 130 has been identified as the lowest score acceptable for admission to the "Gifted Program" unless other factors intervene. In the District's evaluation the Student achieved an IQ of 119 as measured by the WISC-IV. A full 11 points below the standard noted. The District's psychologist presented as a competent, knowledgeable, and credible witness whose professional work is well presented and documented.

The Parent's psychologist who also presented as a competent, knowledgeable, and credible witness obtained different results. The Student was tested using the Stanford Binet Intelligence Scales-Fifth Edition and achieved a Full Scale IQ of 130. Sufficient to be admitted to the District's Gifted Program if other criteria are met. Additionally, the independent evaluator retested the Student using the WISC-IV in which the Student received a Full Scale IQ of 126. Lower than the need score by 4 points, but higher than the previous score of 119 obtained by the District. It must be noted that there is some controversy associated with administering the WISC IV less than 6 months after the administration of the first effort. Nevertheless, it is the Stanford Binet -5th Edition on which this Hearing Officer is relying and not the WISC-IV.

This Hearing Officer accepts the Full Scale 130 IQ as noted in the IEE.

One additional point needs to be made and it must be emphasized that the District at the time of its decision did not have this information available to them. This Hearing Officer would be remiss in the equitable treatment of both Student and the Child if he did not use the evidence made available to him in testimony and exhibits.

An Auditory-Language Processing Evaluation conducted over three sessions in June 2006 indicated that the Student had a mild to moderate high frequency hearing loss along with "auditory processing deficits that will further contribute to problems with processing spoken language in noise, with understanding the speech of those who speak rapidly, and with auditory overload (difficulty processing ongoing spoken language). With no fault on the part of the District, this information was not taken into consideration by the District when determining the Student's eligibility for admission to the gifted program.

§ 16.21. General

- (5) Documented, observed, validated or assessed evidence that intervening factors such as English as a second language, learning disability, **physical impairment**, emotional disability, gender or race bias, or socio/cultural deprivation are masking gifted abilities.

As an additional item, testimony was provided by the Parent and supported by the written recommendation of the Student's Second Grade teacher that the Student possessed considerable creative abilities and leadership characteristics. These traits were challenged by the Third Grade teacher who only saw these attributes at times.

Hearing Officers are responsible for making decisions based on what they see as the facts and the law. In this important situation (because the regulations state that creativity and leadership is an important part of giftedness) a decision as to why one teacher sees a "different" child than another needs to be provided.

§ 16.21. General

- (4) Early and measured use of high level thinking skills, **academic creativity, leadership skills**, intense academic interest areas, communications skills, foreign language aptitude or technology expertise.

Testimony provided by the Student's Third Grade teacher indicated that the Student was "misplaced" in her classroom. More than half of the students in the class were achieving below grade level in all of their subjects and that she was required to spend substantial time in addressing these needs. It occurs to this Hearing Office that children and certainly bright/gifted ones will do what is necessary to fit in, to be one of the crowd, especially when the environment might not be as comfortable as it might be in certain circumstances. The literature is replete with documentation of children who avoid achieving in order to not stand out and thus be the object of unwanted focus on the part of their classmates.

The environment was comfortable for creativity and leadership in one setting and not so in another.

In summary, as previously stated, the Student possesses the characteristics needed for assignment to a gifted program.

The second issue is whether or not the District offered a **Free Appropriate Public Education** (FAPE) for the 2005-2006 school year. The District did indeed offer a FAPE for the 2005-2006 school year and therefore no compensatory education is awarded.

§300.13 Free appropriate public education. As used in this part, the term *free appropriate public education* or *FAPE* means special education and related services that—

- (a) Are provided at public expense, under public supervision and direction, and without charge;
- (b) Meet the standards of the SEA, including the requirements of this part;
- (c) Include preschool, elementary school, or secondary school education in the State; and
- (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of §§300.340–300.350.

The individuals with Disabilities Education Act (IDEA) requires that states receiving federal funds for education must provide every child with a disability with a free appropriate public education (FAPE). This entitlement is delivered by way of the IEP. A detailed written statement arrived at by the IEP team which summarizes the child's abilities, outlines goals for the child's education and specifies the services the child will receive. Oberti v. Board of Education, 995 F.2d 1204 (3d Cir.1993). A school district's failure to offer an IEP reasonably calculated to enable the child to receive meaningful educational benefit will be deemed a denial of FAPE. Board of Education v. Rowley, 458

U.S. 176, 102 S.Ct... 3034 (1982). Where violations of IDEA procedural safeguards result in the loss of educational opportunity, a denial of FAPE also will be found. W.G. v. Board of Trustees of Target Range School District, 960 F.2d 1479 (9th Cir. 1992); Ben G., Special Education Opinion No. 555 (1992).

The Student was assigned to a classroom led by a competent credible teacher who conveyed to this Hearing Officer that she addressed the needs of each of her charges with energy and commitment. Activities were geared to the levels of her students and Student was not an exception. His work papers, as introduced by the Parents, showed accomplishment and interest. The Student received awards recognizing his achievements along with superior report cards on which he received all “A”s. The teacher took pains to group her class for the Language Arts and Mathematics was grouped as a part of the school program. The Student was assigned to groups commensurate with his ability

There was no evidence introduced that indicated that the Student was receiving anything but an appropriate program. The Student was offered a fine program and no compensatory education is warranted since, in the opinion of this Hearing Officer, the absence of specially designed instruction did not negatively impact on the program of the Student. The classroom teacher filled in the gaps.

Independent Educational Evaluations are addressed in the IDEA and the Parent has requested reimbursement for the one undertaken on behalf of the Student.

A parent has the right to an independent evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency. If a parent requests an independent educational evaluation at public expense, the public agency must provide to parents, upon request, for an individual educational evaluation, information about where an independent education evaluation may be obtained, and the agency criteria applicable for independent educational evaluations. A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency. 34 CFR §300.502(a)(1)(2)(b)(1).

In this case, however, Chapter 16. Special Education for Gifted Students, Pennsylvania Code governs these proceedings. No mention is made regarding Independent Educational Evaluations or for the reimbursement of costs to parents. Parents do have the right, however, to present the results of additional testing or evaluations.

§16.63 Impartial due process hearing.

(k) A party has the right to present evidence and testimony, including expert medical, psychological or educational testimony.

Additionally, the information provided by the IEE was for the most part corroborative of the District’s evaluation other than the IQ score and was not made available to the GMDT until after the decision on the giftedness of the Student was made.

The request for reimbursement for the IEE is denied.

The Student is found to possess sufficient characteristics of a gifted student as delineated in 22 Pa. Code § 16.21 for admission to the District's program and is in need of the specially designed instruction that accompanies such participation.

The Student was not denied a FAPE for the 2005-2006 school year and the Parents are not entitled to reimbursement for the expenditure for an Independent Educational Evaluation.

The District is commended for their establishment of their procedures for determining whether a student is mentally gifted. The process presented at the hearing was efficient and responsive to the Parents.

Order

It is hereby ordered that:

1. The Student meets the criteria for inclusion in the School District program for mentally gifted students and is to be admitted for the 2006-2007 school year.
2. The GIEP team shall meet prior to the opening of the 2006-2007 school year in order to craft a GIEP on behalf of the Student that will reflect his strengths and his needs and will be available in time for the opening of school.

August 1, 2006

Max Wald

Max Wald, Ed.D.
Hearing Officer