

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
DUE PROCESS HEARING

Name of Child: Student

ODR #00942/09-10 KE

Date of Birth:
Xx/xx/xx

Dates of Hearing:
April 27, 2010
May 10, 2010

OPEN HEARING

Parties to the Hearing:

Abington School District
970 Highland Avenue
Abington, Pennsylvania 19001

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

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

Claudia Huot, Esquire
Wisler, Pearlstine, Talone,
Craig, Garrity & Potash
484 Norristown Road Suite 100
Blue Bell, Pennsylvania 19422

May 21, 2010

May 30, 2010

Linda M. Valentini, Psy.D., CHO

Background

Student¹ is an elementary school aged student residing in the Abington School District [District] who has been identified as exceptional and in need of specially designed instruction as a gifted student pursuant to Chapter 16 of the applicable Pennsylvania regulations, 22 Pa. Code §§ 16.1-16.65. The Parents requested this hearing because they believe that Student should be permitted to take fifth grade math during the fourth grade and because they believe that the Order of a hearing officer in a prior due process matter has not been implemented with regard to the mathematics section of Student's proffered GIEP.

On May 10, 2010, between the first and second sessions of the hearing, Student took two mathematics placement tests. Although one of Student's scores was below the cut-off score it was very close [J-1] so the District decided to permit Student to take fifth grade math during fourth grade, thus rendering the first issue moot.

On the second issue, for the reasons elaborated upon below, I find in favor of the District.

Issue

Did the January 2010 GIEP revision appropriately comport with the previous Hearing Officer's Order in the area of mathematics?

Findings of Fact

1. Student is enrolled in 3rd grade in the District. There is no dispute that Student is eligible for gifted programming under Pennsylvania Chapter 16. [NT 31; P-1]
2. Following a Due Process Hearing held on December 23, 2009 a Hearing Officer found that Student's GIEP was appropriate in all respects except for the area of mathematics, but found that the Present Levels of Educational Performance [PLEPS] in the GIEP was "clearly based on objective assessments of [Student's] needs and abilities" and were sufficient for Student's mathematics programming. [P-10]
3. Specifically, in her Decision dated January 6, 2010 the Hearing Officer found that "The mathematics goals and objectives were not measurable and failed to address Student's needs for mathematics enrichment" and agreed with "the parents' claim that Student's gifted program in mathematics enrichment is, in many respects, simply a "one size fits all" approach to enrichment". [P-10]

¹ The name, age, gender and current school of the Student is not used in the body of this decision in order to preserve the Student's privacy.

4. The Hearing Officer ordered that the District “reconvene the GIEP team, within fifteen (15) days of the date of this order, to revise Student’s GIEP to provide for appropriate and individualized specially designed instruction, based on Student’s unique needs and abilities, which shall include but not necessarily be limited to mathematics enrichment and, if appropriate, acceleration.” [NT 33, 100; P-10]
5. On January 20, 2010 and on January 25, 2010 the GIEP team met as per the Hearing Officer’s order. Both parents participated in the GIEP meetings as per the signed Participants sheet. [NT 33; S-7, P-11]
6. Both parents also signed a statement indicating that, although a draft GIEP was prepared by District personnel for review and discussion, they had a right to question, express concerns, disagree or make recommendations about the draft. [S-7, P-11]
7. The Supervisor of Gifted Education/Elementary Curriculum Specialist, the principal, Student’s regular education teacher, Student’s gifted support teacher, the District’s Coordinator of Mathematics and Elementary Science, the Parents and their advocate attended the two-hour January 20, 2010 meeting. [NT 76, 106-107; S-6]
8. The District’s Coordinator of Mathematics and Elementary Science reviewed a chart that contained an analysis of Student’s performance on the last mathematics placement test administered in April 2009, showing strengths and needs in the different strands of the Everyday Math (“EDM”) curriculum, the program used by the District for elementary school mathematics. [NT 228-229; S-1, S-4]
9. The previous Hearing Officer had found these PLEPS [based on the previous mathematics placement test] to be sufficient for Student’s mathematics programming.² [NT 38, 49, 75-77; P-10, P-11]
10. The second GIEP meeting was held with the Parents, and included the same team members other than the District’s Coordinator of Mathematics and Elementary Science. A draft GIEP was presented and discussed, with six additional mathematics goals, and short-term learning outcomes/objectives, based on each strand of the EDM program. [S-9, P-11]
11. In addition to the PLEPS, the District also looked at how Student performed in mathematics in 3rd grade in September up to the time of drafting the GIEP in January. [NT 43]

² Notably the Supervisor of Gifted Education and Elementary Curriculum Specialist testified credibly that at the January 20th GIEP meeting the District offered to administer Student the 3rd grade placement tests [to assess knowledge of 4th grade mathematics material] to assess latest levels but the Parents did not respond to this offer either way. [NT 77-78, 116-117]

Based on the results of the placement tests and classroom performance to date the District performed a detailed analysis of Student's performance and developed six specific goals and skills to be addressed in the new GIEP. An open-ended framework of developing proficiency "above the third grade level" was used so that the goals would not limit Student to a certain grade level. [NT 43, 47, 52-53; S-1]

12. Student's 1st annual GIEP goal in mathematics is stated as, "[Student] will develop proficiency above the third grade level in the PA Mathematical Standard area of Numbers and Computation". [P-11]
13. Short-term objectives under this annual goal provide, individually, that Student will a) read and write decimal numbers through the thousandths; b) identify places in decimal numbers and the values of digits in those places; c) translate between whole numbers and decimals represented in words and base-10 notation; d) use mental arithmetic, paper-and-pencil algorithms, and calculators to solve problems involving multiplication of multi-digit whole number times 2-digit whole numbers; e) use mental arithmetic, paper and pencil algorithms and calculators to solve problems involving division of multi-digit whole numbers. [P-11]
14. All the short term objectives under the 1st annual goal for mathematics carried the objective criteria of 80% accuracy on assigned tasks and were to be assessed through Everyday Mathematics unit tests, work samples, and teacher observation. [P-11]
15. Student's 2nd annual GIEP goal in mathematics is stated as, "[Student] will develop proficiency above the third grade level in the PA Mathematical Standard area of Geometry and Measurement". [P-11]
16. Short-term objectives under this annual goal provide, individually, that Student will a) measure length to the nearest $\frac{1}{4}$ inch and $\frac{1}{2}$ cm; b) identify, draw, label and describe points, intersecting and parallel segments, lines and rays; c) measure and identify right, acute, obtuse, reflex, and straight angles. [P-11]
17. All the short term objectives under the 2nd annual goal for mathematics carried the objective criteria of 80% accuracy on assigned tasks and were to be assessed through Everyday Mathematics unit tests, work samples, and teacher observation. [P-11]
18. Student's 3rd annual GIEP goal in mathematics is stated as, "[Student] will develop proficiency above the third grade level in the PA Mathematical Standard area of Algebraic Concepts. [P-11]
19. Short-term objectives under this annual goal provide, individually, that Student will a) solve open sentences and explain the solutions; b) write expressions and number sentences to model number stories; c) apply the Distributive Property of

- Multiplication over Addition to the Partial Products multiplication algorithm. [P-11]
20. All the short term objectives under the 3rd annual goal for mathematics carried the objective criteria of 80% accuracy on assigned tasks and were to be assessed through Everyday Mathematics unit tests, work samples, and teacher observation. [P-11]
 21. Student's 4th annual GIEP goal in mathematics is stated as, "[Student] will develop proficiency above the third grade level in the PA Mathematical Standard area of Probability and Statistics. [P-11]
 22. Short-term objectives under this annual goal provide, individually, that Student will a) find maximum, minimum, range, median, mode and mean of a data set; b) use maximum, minimum, range, median, mode, mean and graphs to ask and answer questions, draw conclusions and make predictions; c) express the probability of an event as a fraction; d) describe and compare events and predict future events using basic probability terms (certain, impossible, likely, etc.); e) predict outcomes of experiments and test the predictions using manipulatives. [P-11]
 23. All the short term objectives under the 4th annual goal for mathematics carried the objective criteria of 80% accuracy on assigned tasks and were to be assessed through Everyday Mathematics unit tests, work samples, and teacher observation. [P-11]
 24. Student's 5th annual GIEP goal in mathematics is stated as, "[Student] will develop proficiency above the third grade level in the PA Mathematical Standard area of Reasoning and Problem Solving". [P-11]
 25. Short-term objectives under this annual goal provide, individually, that Student will a) apply problem solving strategies to solve open ended (scaffolded and non-scaffolded) math problems across the PA mathematics standards (i.e. find a pattern, make a table, write an equation, etc.); b) work in small groups or in pairs to complete Grade 3 Everyday Mathematics challenging extension and enrichment activities provided by the general education teacher. [Student] will work to solve above-grade-level open-ended problems including number sense, practical measurement skills, mental calculation abilities and mathematical reasoning skills. [P-11]
 26. All the short term objectives under the 5th annual goal for mathematics carried the objective criteria of 3 out of 4 on the Abington School District Rubric and were to be assessed through Everyday Mathematics unit tests and work samples. [P-11]

27. Student's 6th annual GIEP goal in mathematics is stated as, "[Student will] apply appropriate critical thinking strategies to solve complex mathematical problems". [P-11]
28. Short-term objectives under this annual goal provide, individually, that Student will a) manipulate and reconstruct pentomino patterns to develop an understanding of congruence, perimeter and area with increasing levels of difficulty; b) practice mathematical skills while solving problems including number sense, mental calculations, practical measurement skills, and the collection, interpretation and presentation of data. [P-11]
29. All the short term objectives under the 6th annual goal for mathematics carried the objective criteria of 95% accuracy on assigned tasks, Mathematics Rubric Score of 3.5 out of 4 and were to be assessed using the Mathematics Rubric Scoring Scale and classroom-based tasks. [P-11]
30. The six above-stated annual mathematic goals, each with corresponding short term objectives, and criteria/ means of measurement are in contrast to the mathematics section of the GIEP of October 2009 critiqued by the previous Hearing Officer that carried only one annual mathematics goal that had five supporting short term objectives. [P-8, P-11]
31. The January 25, 2010 GIEP provided, in addition to seven mathematics-related Modifications/SDI that were present on the October 2009 GIEP, an additional two Modifications/SDI in mathematics. These SDI were that a) Student will participate in a small group with similar ability peers to focus on the individualized needs as outlined in the GIEP; and b) Student will be encouraged to go back and check {Student's} work for task completion and accuracy. [P-8, P-11]
32. Mathematics instruction was to be delivered in the regular education classroom using the Everyday Mathematics program with extension activities/materials of that program specifically chosen for Student and in the APEX Center for 150 minutes (with some time being spent on reading) using the highly individualized computer-based Compass Learning Program. [NT 103, 127-129, 137-138; S-17, P-11]
33. Student also participates in activities for the Math Olympiad chosen for Student, working on exercises designed for students in the fourth, fifth and sixth grades. [NT 138-139]
34. The new GIEP added an additional 30 minutes per week for Student to spend with the gifted education teacher in a small group specifically on mathematics. [NT 72]

35. On January 26, 2010 the District presented the Parents with a Notice of Recommended Assignment [NORA] indicating that Student's services would be provided as per the revised GIEP. The Parents rejected the GIEP and NORA on January 31, 2010 and asked for a due process hearing. [S-11]
36. Student's currently approved GIEP of October 2009 is being implemented in Student's current 3rd grade program through provision of mathematics enrichment activities at the level for students in grade 4 and in some instances at grade 5 or grade 6. [NT 41, 139]
37. Depending on the activity Student may need additional support and instruction in getting to the next level and making sure Student understands the concepts presented, or Student may do okay without the additional support. [NT 42, 158-164]
38. The building team comprised of the principal, the supervisor of gifted education and elementary curriculum specialist, the gifted education teacher and the regular education teacher met one or two times per month to monitor and adjust Student's gifted education program to meet Student's needs³. [NT 123-125]

Discussion and Conclusions of Law

Legal Basis:

Burden of Proof: In November 2005 the U.S. Supreme Court held that, in an administrative hearing, the burden of persuasion, as one element of the burden of proof, for cases brought under the IDEA, is properly placed upon the party seeking relief. Schaffer v. Weast, 126 S. Ct. 528, 537 [2005]. The Third Circuit addressed this matter as well. L.E. v. Ramsey Board of Education, 435 F.3d. 384; 2006 U.S. App. LEXIS 1582, at 14-18 [3d Cir. 2006]. The party bearing the burden of persuasion must prove its case by a preponderance of the evidence. This burden remains on that party throughout the case. Jaffess v. Council Rock School District, 2006 WL 3097939 [E.D. Pa. October 26, 2006]. Parents in this case have the burden of proving that the Gifted Education program offered by the District was not appropriate for Student. *See In Re: The Educational Assignment of A.H.*, Special Education Opinion No. 1787 [Dec. 20, 2006] [holding that the burden of proof in a Chapter 16 case is appropriately placed upon the party who commenced the case]. As the Parents asked for this hearing, the Parents bear the burden of persuasion. However, application of the burden of persuasion analysis does not enter into play unless the evidence is in equipoise, that is, equally balanced so that by definition the party seeking relief has not presented a preponderance of the evidence. In the instant matter, the evidence is not in equipoise as the Parents have not presented sufficient evidence to prove their case.

³ It appears that even though the Parents rejected the new GIEP the District still attempted to provide Student with instruction to meet the Parents' desired aim of Student's passing the placement tests that would enable entry into 5th grade mathematics the following year.

Credibility: Hearing officers are empowered to judge the credibility of witnesses, weigh evidence and, accordingly, render a decision incorporating findings of fact, discussion and conclusions of law. The decision shall be based solely upon the substantial evidence presented at the hearing.⁴ Hearing officers have the plenary responsibility to make “express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses”. Blount v. Lancaster-Lebanon Intermediate Unit, 2003 LEXIS 21639 at *28 [2003]. It is the responsibility of a hearing officer to make credibility determinations in assessing the weight to be accorded the evidence. E.N. v. M. School District, 928 A.2 453, 461 [Pa. Commw. 2007]. The District employees who testified did so credibly, being well-trained and experienced in their fields and being able to clearly articulate the rationale behind the GIEP revisions and the methods that would be used to implement the GIEP. Their testimony was accepted in all respects. Student’s mother’s testimony did not assist in meeting the Parent’s burden of proof, and certain areas such as her misunderstanding of Student’s program and her accepting Student’s word and opinion about aspects of Student’s program did not enhance her credibility.

Gifted Education: In Pennsylvania, the provision of Gifted Education 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 Sch. Dist. v. Commonwealth, Dept. of Educ., 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.

The essential requirements that a school district must meet for a gifted education program to be appropriate are set forth in 22 Pa. Code §16.41[b], which provides that school districts must:

- 1] Enable the provision of appropriate specially designed instruction based on the student’s need and ability; [2] Ensure that the student is able to benefit meaningfully from the rate, level and manner of instruction and [3] Provide opportunities to participate in acceleration or enrichment, or both, as appropriate for the student’s needs. These opportunities shall go beyond the program that the student would receive as part of a general education.

⁴ Spec. Educ. Op. No. 1528 [11/1/04], quoting 22 PA Code, Sec. 14.162[f]. See also, Carlisle Area School District v. Scott P., 62 F.3d 520, 524 [3rd Cir. 1995], cert. denied, 517 U.S. 1135 [1996].

A GIEP must be based on the information in the gifted written report and must include multiple components. 22 PA Code §16.32[d]. Included in these necessary components are “a statement of annual goals and short-term learning outcomes which are responsive to the learning needs identified in the evaluation report”, “a statement of the specially designed instruction and support services to be provided to the student”, and “appropriate 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] [2-3],[5].

Discussion:

The Student meets the qualifying standards for receiving gifted services under 22 Pa. Code §16.1, *et seq.*

It is understandable that the Parents want to assure that Student receives the educational program to which Student is entitled. Parents, however, seek to hold the District to a standard that exceeds the legal requirements of a Gifted Education program under Pennsylvania law set forth above. The standard for gifted programming is “measured against the curriculum that a student would otherwise receive in the regular education classroom.” E. N. v. Methacton School District, 928 A.2d 453, 463 [Pa.Cmwlth. 2007].

After a careful comparison of the GIEP of October 2009 and the revised GIEP of January 2010 this hearing officer concludes that the revised GIEP meets or exceeds statutory requirements for a GIEP and that the revisions resulted in a GIEP that fully comports with the previous Hearing Officer’s January 6, 2010 Order. The GIEP is appropriately individualized to address Student’s gifted needs in mathematics, and reasonably calculated to result in meaningful progress for Student.

Although much detailed testimony was offered by District personnel regarding the gifted education program that Student is receiving in mathematics, and the Parent testified to her beliefs about the nature of the instruction and the materials, upon reflection it is clear that this testimony, although relevant to the first issue that became moot, was not relevant to the second issue. Because the Parents rejected the GIEP of January 2010 it could not be formally implemented, although to the District’s credit a school-based team met regularly to be sure that they were nevertheless supporting Student in areas of relative weakness such that Student could be prepared for the mathematics placement tests.

Conclusion:

The GIEP offered to Student in January 2010 was appropriate and the revisions in the mathematics section fully comport with the previous Hearing Officer’s Order of January 6, 2010 and shall be implemented. As of January 25, 2010 the District offered Student an appropriate GIEP.

ORDER

It is hereby ordered that:

The January 25, 2010 GIEP revision appropriately comports with the previous Hearing Officer's Order in the area of mathematics and therefore as of that date Student was offered an appropriate GIEP.

The District need not take any further action.

May 30, 2010

Date

Linda M. Valentini, Psy.D., CHO

Linda M. Valentini, Psy.D., CHO
Pennsylvania Special Education Hearing Officer
NAHO Certified Hearing Official