

PENNSYLVANIA

SPECIAL EDUCATION HEARING OFFICER

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DECISION

Child's Name: D. S.

Date of Birth: [redacted]

Date of Hearing: March 21, 2013

OPEN HEARING

ODR No. 13571 / 12-13 KE

Parties to the Hearing:

Parents

Representative:

Pro Se

Carbondale Area School District
101 Brookland Street
Carbondale, PA 18407-2207

Ms. Heather Matejik, Esq.
1301 Masons Mill Business Park
1800 Byberry Road
Huntingdon Valley, PA 19006

Date Record Closed:

April 5, 2013

Date of Decision:

April 12, 2013

Hearing Officer:

Shawn D. Lochinger, Esq.

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INTRODUCTION AND PROCEDURAL HISTORY

Student resides in the Carbondale Area School District (the “District”), and has been identified as gifted under the provisions of 22 Pa. Code §§ 16.1 – 16.65. Parents claim that the District has denied the Student an appropriate gifted education in that the District offered an inappropriate gifted education plan while the Student was enrolled at the District. The Parents request compensatory education for the maximum length of time possible given the alleged failure of the District to provide an appropriate gifted program.

ISSUES

- 1) Has the District provided an appropriate gifted education program to the Student from February 12, 2012 through February 11, 2013 (the final day Student attended classes at the District)?
- 2) If not, is compensatory education proper in these circumstances?

FINDINGS OF FACT

- 1) Student attended the District from pre-K through February 11, 2013 and is designated as a gifted student under the terms of 22 Pa. Code §§16.1-16.65 (Notes of Testimony (“NT”) at p. 132).
- 2) Student was withdrawn from the District on February 12, 2013 (School District Exhibit (“S”) 1 at p. 2 and NT 18).

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- 3) Student currently attends a cyber charter school (NT 132).
- 4) Student was initially referred for a gifted evaluation by the Student's Parents based upon Parental suspicion of the Student being gifted (S 6 at p. 1 and NT 30).
- 5) Based upon the evaluation, Student was found to be gifted and in need of specially designed instruction as set forth in a Gifted Written Report ("GWR") that was drafted by the District (S 6, p. 10).
- 6) The GWR indicated that Student "exhibits a significant degree of need, which would require specially designed instruction that can be provided through gifted educational services" (SD 6, p. 10).
- 7) The GWR made the following recommendations for the Student:
 - Student needs "to be provided with enrichment activities that challenge [Student's] advanced abilities."
 - Student "needs to be provided with work at a faster rate."
 - Student "needs to be provided with additional instruction time in the use of advanced or enhanced instruction materials."
 - Student "needs an opportunity to pursue areas of interest."
 - Student "needs to be placed in a gifted education program to help meet [Student's] needs."SD 6, p. 11.
- 8) Using the GWR, the District's gifted teacher developed and wrote a Gifted Individualized Education Plan ("GIEP") for the Student (SD 4 and NT 80, 81, and 83).

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- 9) Parental input in the GIEP was limited to the selection of a “theme” that the Student was interested in at the time (NT 70, 72, 73, and 76). Parents had no input concerning GIEP goals (NT 53, 139, and 140).
- 10) Regular education teacher input in the GIEP was limited to a form providing student characteristics to the gifted teacher (NT 106). There was no evidence of any further direct regular education teacher input or involvement (NT 77).
- 11) The GIEP had an implementation date of March 1, 2012 (SD 4, p. 1).
- 12) The GIEP had two annual goals, each of which was tailored for a particular school year (SD 4, pp. 3 and 4).
- 13) The first annual goal was effective from March 2012 through May of 2012 (for the 2011/2012 school year) and indicated that the Student would “enhance and demonstrate science process inquiry skills, especially observation, data gathering, and classification, through a hands-on study of detective science” (SD 4, p. 3 and NT 53, 54, and 86).
- 14) The second annual goal was effective beginning September 2012 (for the 2012/2013 school year) and called for the Student to “acquire and demonstrate understanding of organs and systems in the human body, and describe the relationship between their structure and function” (SD 4, p. 4 and NT 53 and 70).
- 15) The District issued and Parent (Father) signed his approval on a Notice of Recommended Assignment (“NORA”) placing Student into the gifted program on March 12, 2012 (SD 3, p. 3 and NT 84 and 147).

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- 16) Student's gifted program consisted, in part, of Student being pulled out of class and into a gifted classroom for a 40 minute time period once per week (NT 55, 67, and 69).
- 17) Student spent time in the gifted classroom with the gifted teacher and one other student who had expressed interest in the same theme as the Student (NT 68 – 70).
- 18) The gifted teacher indicated that she brought a list of themes to the GIEP meeting that the Student could choose from that would be the main focus of the Student's gifted pull-out time (NT 53 and 70 – 73). The list was varied, but finite (NT 83, 84).
- 19) The Student was permitted to choose a theme on the list or create the Student's own theme. If the theme selected was not on the list, the choice would be affirmed and offered for instruction by the gifted teacher but only if there were proper materials for the gifted teacher to use (NT 83,84).
- 20) The Student in this case did not venture from the list. Instead, the Student chose a theme for the end of the 2011/2012 school year and eventually, another one for the 2012/2013 school year from the list that the gifted teacher provided (Parents' Exhibit ("P") 5 at p. 1 and NT 53, 54, 70, and 86).
- 21) The gifted class curriculum consisted of the Student reviewing homework from the previous gifted classroom session. A discussion would then ensue concerning the same subject if there were additional questions that were asked or would move into the next week's assignment depending upon the Student's individual work and concerns (NT 62, 63, 99, and 100).
- 22) Student also was eligible for and did, in fact, attend, a gifted education field trip to a farm and a food distribution center (NT 98 and 99).

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- 23) In the Student's regular classroom, the Student performed very well in math (NT 115). As such, the Student was given extra math packets when Student finished Student's work more quickly than other students in the classroom (NT 112 and 117).
- 24) The regular education teacher testified that the Student was better than virtually all students in her classroom at math and utilized the extra credit more than other students in the classroom (NT 122).
- 25) The regular education classroom teacher testified that she gave enhanced packets in various subjects to Student and also to *all* students who finished work early (NT 117, 123, and 124). Parents were aware of this practice (NT 136).
- 26) Student was also given challenge/extra credit questions that were approximately one grade level above the Student's normal grade level work (NT 118 and 119).
- 27) Student was also given the opportunity to select "choice books," which were available in the Student's classroom (NT 123).
- 28) Student was also given the opportunity to complete extra credit projects from time to time that utilized materials that were above the Student's then-current grade level (NT 123).
- 29) Student ended the 2011/2012 school year with a 99.33% average (SD 7, p. 2 and NT 128).
- 30) During the 2012/2013 school year, Student continued to be pulled out of class for 40 minutes, one time per week (P 7, p. 1 and NT 62, 67, 69, and 135).

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- 31) Parent testified that during the 2012/2013 school year, the Student was “bored” with work at the District, including the gifted program (NT 129, 130, 133, 141, and 158). The Student’s classroom teacher disagreed (NT 102).
- 32) During the first marking period of the 2012/2013 school year, Student averaged 97.8% (P 5, p. 1, SD 7, p. 1 and NT 129).
- 33) For the second marking period of 2012/2013, Student averaged 98.6% on Student’s report card (P 5, p. 1, SD 7, p. 1 and NT 128 and 129).
- 34) Parents did not lodge any complaints with the District concerning the Student’s gifted education program prior to February 11, 2013 (NT 133 – 135).
- 35) On February 11, 2013, Parent went to the District and demanded copies of all documents for the Student’s gifted education, including the GWR and the GIEP (NT 141, 142, 146, and 147).
- 36) Parent testified that she had never seen a copy of the GWR or GIEP and was denied copies on February 11, 2013 (NT 130, 141, 142, 146, 147, 149, 152, 153, and 167).
- 37) On February 12, 2013, Parent withdrew the Student from the District and enrolled Student in a cyber charter school (NT 18, 130, 132, 143, and 166).
- 38) Parent testified that Student is working in the gifted and talented curriculum in the cyber charter school for all subjects and that Student is working two grade levels ahead in math (P 9, p. 1, SD 1, p. 3, and NT 160 – 165).

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39) A letter from the cyber charter school indicates that the Student is working at these levels based upon a “non-proctored” and “non-standardized” testing procedure followed by the cyber charter school (P 9, p. 1 and NT 168 and 169).

40) Parent filed the current action on February 26, 2013 SD 1, p. 1 and NT 142).

DISCUSSION AND CONCLUSIONS OF LAW

Gifted education in Pennsylvania is governed by Pennsylvania law as set forth at 22 Pa. Code §§ 16.1 – 16.65 (“Chapter 16”). The purpose of Chapter 16 is to provide an education to each identified student that is based upon the unique needs of that student. This education can include acceleration and/or enrichment programs and services that are rendered according to the student’s intellectual/academic needs and abilities.¹

Chapter 16 also provides for certain procedural safeguards as well as an obligation on the part of the school district to identify an appropriate program for students who are gifted and need specially designed instruction beyond that which is provided in the regular education program. 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, 539 A.2d 785 (1988). However, and importantly, a school district’s “obligation is not without limits....[T]he instruction to be offered need not ‘maximize’ the student’s ability to benefit from an individualized program.” *Id.*

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

¹ 22 Pa. Code § 16.2.

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the request for due process. *E. N. v M. School District*, 928 A.2d 453 (Pa. Commw. 2007). In this case, then, the burden of proof lies with the Parents.

It is also the responsibility of the Hearing Officer to make credibility determinations and to assess the weight to be accorded the evidence. *E. N.* at 461. The specific credibility determinations made at this hearing, as relevant, are discussed below.

The Parents present one overarching argument to the Hearing Officer in this case. Specifically, the Parents argue that the Student's GIEP, which encompasses both the end of the 2011/2012 school year and the beginning of the 2012/2013 school year, was inappropriate in that the Student was not provided with a proper gifted education. The Parents claim a number of procedural and substantive issues with the GIEP.

First, the Parents argue that the GIEP was not properly formed, as a regular education teacher was not present during the GIEP meeting. The Parents also argue that they never received a copy of the GIEP. The Parents also indicate that they were not consulted nor did they provide any input for the goals of the GIEP. All of these events, the Parents argue, give rise to an improper GIEP that did not meet the needs of the Student.

The Parents also argue, more substantively, that the Student's GIEP was not individualized and that the Student's program consisted of work and projects that were open to other students and were not appropriately focused on the Student's specific needs. The Parents claim this manifested itself by the Student being bored and the Student thus not receiving a proper gifted education.

The School District counteracts these arguments by first indicating that the GIEP was sent home with the Student and that teacher input was handled through paperwork supplied by the Student's regular education teacher. The District also argues that the program must be viewed more globally than the Parent advocates and that overall the Student's program was

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appropriate. The District points to the fact that the GWR had five specific requirements that the Student needed to be met in order to address the Student's educational needs and that all five of these requirements were met through the Student's work in both the gifted and regular classroom. This manifested itself through a pull out program that was specifically designed to meet the Student's interests and needs and through accelerated and additional work in the classroom that was provided by the Student's regular classroom teacher.

Initially, it is apparent that there were procedural errors in this matter. Specifically, it does not appear as though the Parents had any input into the goals that are set forth in the GIEP. And, while the Parents (and the Student) were able to help choose a "theme" that was aimed at the Student's particular needs and desires, Parental involvement in the GIEP process ended there. Thus, it is questionable whether the Parents were truly participants on the GIEP team, as required by Chapter 16. More specifically, gifted education regulations require that the GIEP team "develop" the initial GIEP (22 Pa. Code §16.32(a)). One or both of the student's parents *must* be included on the GIEP team 16 Pa. Code §16.32(b)(1) (emphasis added). Here, as stated above, the minimal parental involvement in the GIEP process does not rise to the standards required by the regulations, as the Parents did not help to "develop" the Student's GIEP. Moreover, there is no evidence that a current teacher was truly a part of the GIEP team (other than through the indirect use of a form that was handed over to the gifted teacher). This is also in violation of the regulations (16 Pa. Code §16.32(b)(4)). The District has therefore failed to follow the regulations set forth in Chapter 16 concerning the proper development of a GIEP and the Student's GIEP in this case must be seen as inappropriate as a result. The question of compensatory education is thus open and will be discussed below.

As for the substantive matters, the District strongly implied in its argument that the Student either did not belong in the gifted program or was "barely" eligible for the gifted program.² However, the same facts that the District used to argue that the Student was "barely"

² While the District strongly implied this position during the hearing, it actually stated the position during its closing argument.

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eligible for the gifted program were the same exact facts upon which the District issued a GWR indicating that the Student “exhibits a significant degree of need which would require specially designed instruction...” (SD 6, p. 10). As such, I must admonish the District for this inconsistency. Once the District placed the Student into the gifted program and declared the Student to be a gifted student, the District should not then, on the same set of facts and circumstances, appear at a hearing and argue that the Student is not truly a gifted student. While in this case the Student’s giftedness is not an issue before the Hearing Officer and while the Student was never removed from the gifted program, it is troubling that the District would take such a stance concerning a Student the District itself placed into the gifted program.

There is also a very strong implication that by being “barely” eligible for the gifted program, the Student does not require more than a “non-gifted” student. However, the GIEP is, in essence, an agreement set forth by the District that it will, in fact, provide specially designed instruction in the form of an appropriate gifted education to the Student. As such, I am not pleased with the District’s stance or position in this regard. Unless there was a clear and specific issue before the Hearing Officer in this matter, the District had *no* right to argue that the Student that it placed into the gifted program did not deserve to be there. If this was the District’s true position it should not have agreed to the student’s eligibility in the first instance.

That being said, the GWR, which was not a point of contention in this matter, specifically set forth five areas of need for the Student. These five requirements were set forth in the GWR as follows: 1) the Student needed to be “provided with enrichment activities that challenge the Student’s advanced ability; 2) the Student needs to be provided with work at a faster rate; 3) provided with additional instruction time and the use of advanced or enhanced instruction materials; 4) needs an opportunity to pursue areas of interest; and 5) needs to be placed in a gifted education program to help meet Student’s needs” (SD 6, p. 11) There was no evidence presented or even suggested that would show these needs to be incorrect or improper in any way. As such, I accept these areas of need as proper for this Student.

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From a practical standpoint, the Student was given a gifted program which met these five areas of need. The Student was pulled out of a regular classroom and into a gifted classroom where the Student met with the gifted teacher and with one other student who expressed an interest in the same “theme” as the Student. This was done for one forty minute period one time per week. The Student also participated in the District’s “Gifted Night Of Sharing,” in which the Student demonstrated knowledge in the Student’s gifted area through a project and public presentation to other students and parents (NT 74, 96, 97, 100, 107, and 108). It was also shown that the Student received advanced materials in the Student’s regular education classroom across a variety of subject matters. The Student, overall, was given this higher level work *in addition to* the Student’s regular classroom work, thus requiring additional and faster paced work. The Student was also given the opportunity to embark on a gifted field trip through the gifted program, which the Student took advantage of in this situation. The Student also was given extra credit projects above the Student’s grade level, provided with access to “choice” books in the Student’s regular classroom setting, and given extra/enhanced work packets by the Student’s regular education teacher.

While the Parents argue that this program resulted in the Student being bored, I find no credible evidence of this, as Student’s grades remained high and the Student’s regular classroom teacher testified credibly that the Student remained engaged in class (NT 102). Perhaps just as importantly, the law clearly indicates that while a district must present gifted students with an appropriate education, that obligation is not without limits, as “the instruction to be offered need not ‘maximize’ the student’s ability to benefit from an individual program.” *Centennial School District v. Department of Education*, 517 Pa. 540, 539 A.2d 785 (1988). Here, I believe that the District’s program was not the best, and certainly did not “maximize” the Student’s ability. However, as the case cited above indicates, this is not the standard that the District is held to in this matter.

Instead, I find that there was simply not enough evidence presented at the Hearing for the Parents to carry their burden of proving that the Student’s substantive program was

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inappropriate. While each individual aspect of the program was not necessarily designed specifically for the Student, the evidence indicates that the entire program, when looked at as a whole, was, in fact, appropriate to meet the Student's needs and was adequately individualized for the Student to benefit meaningfully from the rate, level, and manner of instruction.

Still open, however, is the question of compensatory education for the District's obvious failing in terms of following proper procedure in this matter. In Pennsylvania, a student is entitled to an amount of compensatory education "reasonably calculated to bring [the student] to the position that [the student] would have occupied but for the school district's failure to provide a FAPE." *B.C. v. Penn Manor School District*, 906 A.2d 642 (Pa. Commonwealth 2006). "This may require more compensatory education time than a one-for-one standard would, while in other situations the student may be entitled to little or no compensatory education because [the student] has progressed appropriately despite having been denied a FAPE." *Id.*, at 651.

Here, while there were clearly procedural errors by the District, I am hard-pressed to find that the errors substantively impacted the Student's GIEP or the Student's ultimate gifted education. While the District, as a whole, was not as purposeful in addressing the Student's needs as it could have and should have been, the resulting program that the Student was subjected to ultimately met the Student's needs in this case.³ Finally, the Student's gifted teacher, who I found to be a very credible witness, convinced me that despite the lack of proper Parental and teacher involvement, she was able to craft a GIEP that adequately addressed the Student's needs. I thus find that the GIEP would not have been substantively different in this case had the Parents and teacher been appropriately involved.

³ It should also be made clear that there was not a cohesive or comprehensive effort by the District to coordinate efforts between the various teachers involved with the Student in this case. Fortunately for the District, the individual teachers involved in this case were very conscientious teachers who worked diligently to provide the Student with a proper gifted education.

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Based upon these findings, I will *not* award compensatory education to the Student in this matter, as the evidence leads me to conclude that the Student would not have been in a different position had the District followed proper procedures in this matter.

ORDER

In accordance with the findings of fact and conclusions of law set forth above, the District's GIEP is found to be procedurally inappropriate. It is further found, however, that the Student in this matter, despite the procedural errors found above, is not in a different position than the Student would have been in had the District followed proper procedures. Therefore, it is hereby ORDERED that this matter be dismissed without remedy to the Student.

Shawn D. Lochinger
HEARING OFFICER

Date of Decision: April 12, 2013