

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.

DECISION

Child's Name: J.M.

Date of Birth: [redacted]

Date of Hearing: December 2, 2014

OPEN HEARING

ODR No. 15522 / 14-15 AS

Parties to the Hearing:

Representative:

Parent[s]

Janine Ehsani, Esq.
3041 Shepherd Road
Bensalem, PA 19020

Bensalem Township School District
3000 Donallen Drive
Bensalem, PA 19020

David Painter, Esq.
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Date Record Closed:

December 9, 2014

Date of Decision:

December 12, 2014

Hearing Officer:

Shawn D. Lochinger, Esq.

INTRODUCTION AND PROCEDURAL HISTORY

Student currently resides in the Bensalem School District (the "District"). The Student is [early elementary school-aged] and entered the District for the first time in August of 2014. The Student's Parents suspected the Student to be gifted and informed the District of such. The District issued a "Permission to Screen" form to the Parents so that a screening test could be performed. The Parents refused to sign it on the basis that they had requested a full evaluation, not just a screening. The District, as per its policy, appraised the Student on the rather limited information

it had (and without the standardized screening test) and declared that the Student was not eligible, under its policy, for a full evaluation and was also not eligible for gifted status at the District. The Parents then asked for a Due Process hearing in order to obtain a full evaluation for the Student.

ISSUE

Should the District be required to perform a full Gifted Multidisciplinary Evaluation (“GMDE”) on the Student?

FINDINGS OF FACT

It must first be noted that the parties presented, prior to the hearing, a list of stipulated facts. This document was admitted into evidence as Hearing Officer (“HO”) Exhibit 1 and will be referred to as such throughout this decision.

- 1) Student is currently enrolled as a student in the District (HO-1).
- 2) The Student is an early elementary student whose first day of school was on August 25, 2014 (HO-1).
- 3) On September 29, 2014, the Parents sent a letter to the Principal of the Student’s Elementary School requesting a “multidisciplinary evaluation” to determine if the Student was gifted (P-2).
- 4) The September 29 letter specifically requested that the Student’s Mother be a part of the multidisciplinary team and that she had input to give to the team (P-2).
- 5) The September 29 letter also specifically requested a Permission to Evaluate form be sent so that the Parents could sign it and begin the evaluation process (P-2).
- 6) On September 30, 2014, the District responded by sending the Parents a “Consent For Educational Screening” form (P-3).

- 7) On October 1, 2014, Student's Mother sent an e-mail to the District objecting to the screening on the basis that a "screening is different from the evaluation as it is limited in its parameters and does not include an IQ test" (P-4).¹
- 8) On October 2, 2014, the District responded to the October 1 e-mail via an e-mail of its own from the Elementary Counselor, which set out the District's gifted screening process (P-5).
- 9) Essentially, the gifted screening process, according to the District's October 2, 2014 e-mail, starts with a Permission To Screen form that would allow the District to administer the KBIT2 (the "Kaufmann Brief Intelligence Test") to the Student (P-5).
- 10) According to the District's October 2 e-mail, the District had a Child Study Team ("CST") in the Student's building that would review the results of the KBIT2 along with any other classroom data that the District had on the Student (P-5).
- 11) The CST would then make a recommendation as to whether the Student should be fully evaluated or if there was no need for additional evaluation (P-5).
- 12) The e-mail concluded by stating that if the Parents signed the Permission to Screen form, the process could begin as outlined above. If the Parents did not sign the form, the District would deny the Parents request for a gifted evaluation due to a "lack of sufficient information" to allow the team to make a decision on whether a full evaluation was needed or not (P-5).
- 13) The Parents were not a part of the CST, nor were they invited to be members of the CST (Notes of Testimony ("NT") at pages 54, 59, and 84).
- 14) The District did not request, nor did the Parents provide additional information to the CST (NT 54).
- 15) In response to the October 2 e-mail, the Parents sent an e-mail later on October 2, 2014 indicating that the Parents had contacted the Pennsylvania Department of Education and

¹ Note that on Exhibit S-4, Parent uses the dates September 9 and 10 instead of September 29 and 30. It is clear, from the context of the e-mail, that the 9 and 10 dates are incorrect and should be 29 and 30.

that they (the Parents) believed that the District should provide a full evaluation instead of the screening offered (P-6).

16) The Parents cited 22 Pa. Code §16.22(b) and §16.22(c) to the District to support their request for a full evaluation (P-6).

17) Despite not performing a KBIT2, the District's CST met on October 3, 2014, and reviewed the evidence at their disposal concerning the Student's academic performance to date (NT 62, 70, and 96).

18) Since the CST met in early October, and since there had not been a KBIT2, the CST used mainly information from the Student's teacher that she had gathered from a kindergarten readiness test that was given over the first two weeks of school (NT 72, 114, and 129).

19) The information from the Student's teacher seemed to indicate that the Student was not gifted (P-9).

20) When Student's Mother requested an update on October 8, 2014 (P-7), the District indicated that a decision had been made, but did not immediately reveal the decision to the Parents (P-8).

21) In a letter dated October 3, 2014 (but clearly sent at a later date),² the District informed the Parents that the CST had determined that there was no need for a full evaluation of the Student (P-9).

22) On October 8, 2014, the District issued a Notice of Recommended Placement ("NORA") indicating that the Student was not eligible for a further evaluation and placed the Student in the regular curriculum at the Student's neighborhood school (P-10).

23) The Parents initially responded on October 16, 2014 with a letter indicating that they would be disapproving the NORA and again reiterating their position that they believed the Student was entitled to a full evaluation and not just a screening (P-12).

24) The District was subject to gifted compliance monitoring beginning in 2012 (NT 107).

² The most likely date of the letter was sent is October 8, 2014.

- 25) As part of the compliance monitoring, the District was required to put a screening process into place to locate its gifted students (NT 139 – 140).
- 26) That screening process, put in place as part of the compliance monitoring, is what the District spelled out for the Parents in its October 2, 2014 e-mail (P-5), (P-17), and (P-18).
- 27) The District’s Special Education Director testified that after developing the policy outlined to the Parents, the District is no longer being monitored (NT 146 – 147).

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.³

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 the request for due process. *E. N. v M. School District*, 928 A.2d 453 (Pa. Commw. 2007). In this

³ 22 Pa. Code § 16.2.

case, then, the burden of proof lies with the Parents. Finally, it is 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 in this matter have brought one issue to the attention of the Hearing Officer. Specifically, the Parents' Complaint, as well as the agreement of the parties at the start of the hearing, indicated that the sole issue in this case is whether the District has properly followed the procedural requirements of Chapter 16 concerning a Gifted Multidisciplinary Evaluation (GMDE). The District has a procedure in place that requires the District, through a Child Study Team ("CST"), to determine if a full evaluation is needed after one is requested by the parents of a "thought to be gifted" student. The District thus first requires parents to consent to a KBIT2 screening test in order to help determine if a full evaluation is needed. The Parents here, however, refused to sign the Permission to Screen form on the grounds that they believed a full evaluation was required under the Regulations, as opposed to a simple screening. The District, lacking parental consent to administer the KBIT2 did not subject the Student to the test, but the District did otherwise proceed with the remainder of the screening process. The District thus "screened" the Student on the basis of very limited information, ultimately deciding that the Student did not meet the requirements under its policy for a "full" GMDE. The Parents have thus requested that the Hearing Officer put forth an Order that would require the District to issue a Permission to Evaluate form to the Parents and for the District to perform a full GMDE on the Student if and when the form is executed and returned.

Initially, it must be stated that this is a rather unique situation. The District, due to a previous monitoring situation, has a gifted "screening" process in place. This process is used whenever the District suspects a student of being gifted, and also for occasions when parents of "thought to be gifted" students request that their child be evaluated for inclusion in the gifted program. Normally, parents consent to a screening that involves a review of all relevant academic records, including test scores, grades, statewide assessments, teacher input, and the results from a screening test (the KBIT2).⁴ In a "standard" situation, the District has a rather large amount of data to consider when determining if a full and complete evaluation is necessary or not.

⁴ The inclusion of the KBIT2 in the review process is the reason for requiring parental consent.

However, the current case did not present a “standard” situation. First, the Parents did *not* consent to the KBIT2 on the grounds that they believed that they were entitled to a full evaluation with parental input and a full and complete IQ test.⁵ The District’s policy clearly *assumed* that the Parents would consent to the KBIT2. When the Parents here did not consent, it threw a proverbial “monkey wrench” into the District’s policy/plan. Second, because of the Student’s very young age and lack of school experience, the District had virtually no information on the Student except for a kindergarten readiness evaluation that was administered by the Student’s teacher in the first several weeks of school. The Student performed only moderately well on the readiness testing, failing to reach the readiness benchmark on 2 of the 11 readiness tests (NT 195 – 196). This evidence was supplemented by the Student’s teacher, who testified credibly that the Student was not performing consistently with what the teacher would expect from a gifted student at the time the Parents requested an evaluation (NT 186 and 207). Third, and finally, the Parents provided no information concerning the Student (nor were they invited to provide such information) to the District. As such, there was very little evidence for the District to use, other than a very small relatively *negative* sample of work, to determine if there should be a full evaluation or not in this case.

Thus, the factual record is, to put it delicately, *interesting*. Legally, the most important inquiry here is if the District’s policy is in keeping with requirements of Chapter 16. While there is an answer to this question, there is not a *simple* answer. I will endeavor to fully explain. The pertinent regulations in this case is set forth at 22 Pa. Code §§16.22(b) and (c). These regulations state as follows (emphasis is added):

(b) Referral for gifted multidisciplinary evaluation *shall* be made when the student is suspected by teachers or parents of being gifted and not receiving an appropriate education under Chapter 4 (relating to academic standards and assessments) and one or more of the following apply:

- (1) A request for evaluation has been made by the student’s parents under subsection (c).
- (2) The student is thought to be gifted because the school district’s screening of the student indicates high potential consistent with the definition of mentally gifted or a performance level which exceeds that of other students in the regular classroom.
- (3) A hearing officer or judicial decision orders a gifted multidisciplinary evaluation.

⁵ Note that the KBIT2 is simply a screening device and gives only an estimate of an IQ score. It should not be mistaken for a full IQ test/evaluation.

(c) Parents who suspect that their child is gifted may request a gifted multidisciplinary evaluation of their child at any time, with a limit of one request per school term. The request must be in writing. The school district shall make the permission to evaluate form readily available for that purpose. If a request is made orally to any professional employee or administrator of the school district, that individual shall provide a copy of the permission to evaluate form to the parents within 10 calendar days of the oral request.

Also pertinent is 22 Pa. Code §16.21(a), which states that “Each school district shall adopt and use a system to locate and identify all students within that district who are thought to be gifted and in need of specially designed instruction.”

What this means is that there are two distinct processes at work. First, under §16.21, a district is under an affirmative obligation to find gifted students within its student population. This is what most would term a “screening” process. Essentially, it requires a district to have a procedure in place that would allow it to locate “thought to be gifted” students. Here, the process presented by the District clearly appears to be such a screening process (*see*, (P-5), (P-17), and (P-18)). Essentially, the District refers students that appear to be gifted to the CST, which reviews pertinent information, including (assuming parental consent) a KBIT2 test result. The team then determines if the evidence is such that further evaluation is necessary. The District’s process would appear, on its face, to meet the general obligation set forth by §16.21.

However, in the present case, and under §16.22, an entirely different scenario is presented. Unlike 16.21, the process anticipated by §16.22 is clearly not a screening, but a full Gifted Multidisciplinary Evaluation (GMDE). Unlike §16.21, which places an affirmative obligation on the District to screen potentially gifted students, §16.22, requires several criteria be met in order to trigger the evaluation process. First, either a parent or a teacher must “suspect” that a student is gifted. Second, the parent or teacher must also “suspect” that the student is not receiving a proper education under Chapter 4. Third, the request must be made by the parent in writing (§16.22(b)(1)).⁶ Importantly, it is clear that all three of these conditions must be met in order for the District to be required to perform a GMDE.

⁶ While there are two other criteria mentioned in §16.22(b), the parental consent requirement §16.22(b)(1) is the one implicated in this case. The other two (§16.22(b)(2) and §16.22 (b)(3)) are not pertinent here and are thus omitted from the requirements set forth herein.

This leads to one initial conclusion: the District's attempt to push the Student into a screening process, instead of a GMDE, was improper *if* the three requirements of §16.22(b) were met. Assuming that the Parents have met the conditions set forth above, the language of §16.22(b) makes it clear that the District "*shall*" refer the Student for a GMDE. If the Parent meet the requirements (which are analyzed below), the Regulations are clear that the District is obligated to perform a full GMDE, not just a screening. This is even more clear when one reads the language of §16.22(b)(2), which indicates that the District must provide a GMDE if its own "screening" process indicates that the student may be gifted. This implies that a GMDE and a screening are two separate actions. It also means that a full evaluation, not just a screening, must be given if the terms of §16.22(b) are met. Importantly, the Regulations do *not* indicate that parental requests lead to a "screening," which then leads to an evaluation. While the Regulations do not offer separate definitions of "screening" and "evaluation" (the two terms are placed together in one definition of "screening and evaluation process" at §16.1), screening and evaluation are clearly two different concepts using both the language of the Regulations and common sense.⁷

The District argues strenuously that the Regulations clearly anticipate that a District has the right to *decline* a GMDE request. The District argues that this clearly means that District's have discretion to, in essence, say "no" to a parental request under §16.22(b). I find that the District is partially correct. The Regulations clearly do give the District the right to decline a request for a GMDE. Such a request could be denied if, for example, the request is made within the same school term as a previous request. More specifically in this case, however, the District has the right to decline a request if the requirements of §16.22(b) are not met. The District goes to great lengths arguing rules of statutory construction and asking for a reading of §16.22(b) that is in keeping with the entire context of Chapter 16.⁸ But, using the District's logic, the word "shall" in §16.22(b) is read out of existence, as the District's conclusion to its rather complex argument is that "shall" really means "may." The District's statutory construction argument becomes necessary only if there is a clear ambiguity in the regulation to be interpreted. Here, there is no such ambiguity. The proper interpretation of the regulation, then, is to say that providing a full GMDE is mandatory

⁷ Evaluation requirements are covered in great detail throughout the rest of §16.22 (specifically, §16.22(d-j) deals with GMDE requirements).

⁸ The District also asks for a reading of the Chapter 16 regulations that are in issue here that is in keeping with Chapter 14. While the language of the sections concerning an evaluation may be nearly identical in Chapters 14 and 16, there is a clear distinction between the two Chapters and I will not read Chapter 14 and its various interpretations into Chapter 16.

if the requirements listed thereunder are met. If those requirements are *not* met (and there is room for discretion here), the District has the right to decline the request.

Here, the question thus becomes whether the Parents have met the requirements of §16.22(b). If they have, the District would be required to provide a full GMDE, not just a screening. If not, the District had the right to decline the request.

I will start with the last condition in the regulations, namely that the Parents must request an evaluation in writing. Here, this condition has easily been met, as the Parents made written requests on more than one occasion, spelling out exactly what they wanted (a full evaluation, not a screening) and even supporting it with a citation to §16.22. The parties have also stipulated to this fact (HO – 1).

Next, the Parents must suspect that the Student is gifted. Here, the parties have stipulated to this fact (HO – 1). Moreover, the Student’s Mother testified credibly that she suspected that the Student was gifted before the Student started kindergarten. The Student’s Mother has two other gifted children, and testified that the Student showed many of the same signs as the Student’s two older siblings (NT 49 – 50). Although this testimony is contradicted by the Student’s teacher, §16.22 requires only that “teachers *or* parents” suspect giftedness (emphasis added). Here, although the two witnesses have different opinions of the Student’s abilities, I find that both were credible. The Student could easily have shown signs at home that were not yet on display in the school setting. It was also uncontradicted that the Student’s Mother did not share (nor was she asked to share) information with the District about the Student. And the teacher’s testimony was limited to only a 17 school day time period, hardly enough of a sample to show the Student’s complete range of abilities. Accordingly, despite the contradictory testimony, I find that the Parents have been able to show that they legitimately and reasonably suspected that the Student may be gifted.

This leads to the final requirement – that the Parents reasonably⁹ suspect that the Student was not receiving an appropriate education under Chapter 4. Initially, it must be stated that there

⁹ I have purposefully inserted the word “reasonable” here, as it is clearly implied in the regulatory language. I also agree with the District that it should not be burdened with every single parental request made to evaluate a student. Instead, there is a clear implication in the regulation that there must be an element of reasonableness to the parental

is an ambiguity written into §16.22(b). The sentence in question reads, in the pertinent part, as follows: “Referral for [GMDE] shall be made when the student is suspected by teachers or parents of being gifted and not receiving an appropriate education under Chapter 4...” The ambiguity is whether the word “suspected” is read *only* with the “being gifted” part of the sentence, or if the word “suspected” applies to both being gifted *and* not receiving an appropriate education under Chapter 4. The Pennsylvania Department of Education (“PDE”) Guidelines dated May of 2014 indicates that PDE believes that the word “suspected” applies *only* to the part of the sentence pertaining to the parents’ belief that the student is gifted. The Guidelines set up the condition that the student is not receiving an appropriate Chapter 4 education as a separate requirement that eliminates the word “suspected.” PDE’s interpretation would thus have one read the Regulations in a way that would require the parents to actually prove the student was not receiving an appropriate education, as opposed to simply proving that they “suspect” the student was not receiving an appropriate education. However, the Guidelines are simply what they are called – guidelines. They have no force or effect of law. I find that the reading set forth by the Guidelines is unreasonable and untenable. While Parents can plausibly be expected to prove they reasonably *suspect* an inappropriate education, there is virtually no way that they can prove that the student is *actually* being inappropriately educated *without* the benefit of the full evaluation that they are requesting. Only after the Student is fully evaluated would the necessary proof be in the Parents’ hands. As such, I find that the third condition can be met by the Parents showing that they had a reasonable suspicion that the Student was not being appropriately educated under Chapter 4.

This, however, is where the Parents case at first seems to fall short. At the time of the request for a full evaluation, the Student had only been in school for 17 school days. And since this was the Student’s first exposure to school, these were the only 17 days that the Student *ever* spent in school. Moreover, the evidence seems to indicate that the Student was not completely ready for kindergarten, as the Student was not able to reach the benchmark in several of the readiness tests given by the teacher to start the year. Credible testimony by the teacher also indicated that the Student was already receiving differentiated instruction in the classroom, as the teacher essentially differentiates instruction for all of her students depending on each one’s

suspicions that a student may be gifted and not receiving an appropriate education under Chapter 4. For example, parents requesting evaluations for students who have very poor test scores and below average grades would not, obviously, have a “reasonable suspicion” of student giftedness. The regulations therefore allow the District some limited discretion when determining if parental suspicions concerning giftedness are reasonable or not.

abilities. As such, I do not necessarily believe that the Parents could have reasonably suspected that the Student failed to receive an appropriate education. The Student's education had barely begun, not giving either party enough time to fully evaluate whether the Student was receiving an appropriate education. Nor had the Student performed in a way that made it abundantly clear that the District's curriculum was not appropriate to meet the Student's needs.

However, I am also faced with a stipulated fact that cuts against this initial determination. Specifically, in the stipulated facts set forth in HO – 1, it states as follows: “Student's parents suspect [the Student] of being gifted and in need of specially designed instruction.” While this does not exactly mirror the language of §16.22(b), it certainly appears to capture the essence of the requirements set forth there. Thus, the parties have agreed that the Parents have, in fact, met the requirements of §16.22(b).

Frankly, the stipulated facts of this matter tie my hands. The record indicates (due to the stipulation filed and admitted as HO – 1) that the Parents here have met the requirements of §16.22(b). I will thus issue an Order indicating that the District should issue a Permission to Evaluate Form as soon as possible, but in no event later than five (5) days from the date of this decision and to perform a full GMDE on the Student within the proper timelines if and when the Parents execute and return the Permission to Evaluate to the District.

Finally, in the interest of clarity, I will reiterate that while the District is required to screen students in an attempt to locate gifted students, different rules apply when parents request a full GMDE. As long as the requirements of §16.22(b) are met, the District “shall” perform a full GMDE as set forth herein. And, although it should be clear from all that is written above, I will strongly decline the Parents request to issue an Order going beyond the Student's case in this instance.

ORDER

In accordance with the findings of fact and conclusions of law set forth above, it is hereby ORDERED that the District issue a Permission to Evaluate Form to the Parents within five (5) days of the date of this decision. District will then subject the Student to a full GMDE in

accordance with the timelines and requirement contained in Chapter 16 (if and when the Parents execute and return the Permission to Evaluate).

Shawn D. Lochinger
HEARING OFFICER

Date of Decision: December 12, 2014