

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: E.K.

Date of Birth: [redacted]

Date of Hearing: April 23, 2015

OPEN HEARING

ODR No. 16091 / 14-15 AS

Parties to the Hearing:

Representative:

Parent[s]

Pro Se

Palisades School District
39 Thomas Free Drive
Kintnersville, PA 18930-9657

Sharon Montanye, Esq.
Sweet, Stevens, Katz, & Williams
331 East Butler Avenue
New Britain, PA 18901

Date Record Closed:

May 4, 2015

Date of Decision:

May 8, 2015

Hearing Officer:

Shawn D. Lochinger, Esq.

INTRODUCTION AND PROCEDURAL HISTORY

Student currently resides in the Palisades School District (the "District"). The Parties agree that the Student is gifted under the terms of the law and is eligible for gifted services through the District. The Student was placed into the District's gifted program during the 2013/2014 school year and received gifted education services mainly through a pull-out program and some

enrichment activities. When the Student's 2014/2015 GIEP was being discussed, the Student's mother requested that the Student be accelerated in math and in science due to the Student's high rate of acquisition and retention. While several forms of acceleration were discussed, the District deemed that the Student was not in need of acceleration. The Student's mother disagreed and brought this Due Process Hearing, asking specifically that the Student be accelerated in math and science moving forward. Based upon the facts, evidence, and law presented below, I will find that there is not enough evidence to support a finding that the Student should be accelerated. As such, I will issue an Order in favor of the District in this matter.

ISSUE

Should the Student be accelerated in math and science?

FINDINGS OF FACT

- 1) The Student currently resides in the School District (School District Exhibit ("S") – 1).
- 2) After screening showed that the Student was potentially gifted, the Student was evaluated for giftedness during the 2013/2014 school year ((S-2) and Notes of Testimony ("NT") at pp. 60-62)).
- 3) The Student was evaluated in December of 2013 and was shown to have a Full Scale IQ score of 126, in the "superior" range ((S-2); (NT 63 - 64)).
- 4) The Student's processing speed, however, was found to be in the "average range" (a standard score of 94) ((S-2); (NT 63-64)).
- 5) When the Student's processing speed was eliminated from the evaluation, the Student was shown to have a General Ability Index ("GAI") of 130, in the "very superior" range ((S-2); (NT 64)).

- 6) Both the Student's teachers and the Student's mother reported that the Student demonstrates quick acquisition skills and that the Student retains facts after they are learned (S-2).
- 7) The results of the Student's testing and evaluation were compiled into a Gifted Written Report ("GWR") dated December 18, 2013 ((S-2); (NT 60)).
- 8) The GWR indicated that the Student was gifted and in need of specially designed instruction, thus making the Student eligible for gifted placement and programming ((S-2); (NT 20, 60, 66)).
- 9) A Notice of Recommended Assignment ("NORA") formalizing the placement was issued by the District and signed by the Student's mother on December 18, 2013 ((S-3); (NT 24, 66)).
- 10) Also on December 18, 2013, a Gifted Individualized Education Plan ("GIEP") was issued which indicated that the Student would receive gifted services through a pull-out program for a minimum of 90 minutes per six (6) day cycle (P-2).
- 11) There is no indication on the record that there were any issues with the Student's GEIP during the 2013/2014 school year.
- 12) During the 2014/2015 school year, however, the Student's mother began to believe that the Student's program was not "well designed" and that program did not reach into the regular classroom well enough ((S-1); (NT 27, 36, 39)).
- 13) The Student's mother indicated to the District that the Student "thrived" when challenged (S-4). Testimony from the District supports this contention (NT 99).
- 14) The District presented a draft GIEP dated December 11, 2014 ((S-4); (NT 53, 57)).
- 15) The Student's mother complained about the draft GIEP's lack of acceleration for the Student and spoke to the District about acceleration options (NT 28, 29, 30, 33, 37-39, 44, 46-47).
- 16) Acceleration in the form of grade skipping was discussed for the Student (NT 39).

- 17) Both the District and the Student's mother felt that grade skipping was not a good option for the Student (NT 39-40).
- 18) There were also discussions concerning "unit" or "subject" skipping. In the District, this means that the District pretests on each unit in a certain subjects. If any student consistently scores high enough on the pretests, that student would not have to work on that particular unit, but would instead work on some enrichment activity or even move on to the next level (for example, in math) (NT 76-79, 83-84, 102-104).
- 19) The District testified that it already has this plan in place for *all* students, including the Student here, outside of the GIEP context. (NT 76-79, 83-84, 102-104).
- 20) The Student's mother indicated that the Student learns at a faster rate than other students, but that the Student still needed basic instruction in the curriculum before moving forward to the next unit in any given subject. Student's mother thus believed that acceleration should be in a form other than the "pretest" manner used by the District (S-1).
- 21) The Student's mother and the District had at least three (3) GIEP meetings in an attempt to put a new GIEP in place for the Student in December of 2014 ((S-1); (NT 44).
- 22) During these meetings, various forms of acceleration were at least mentioned (NT 28-29, 33, 37, 39-40, 41). Parent indicated during testimony that the Parties "talked through" "all the different kinds of acceleration" that the Student's mother could find via outside resources (NT 41).
- 23) Parent felt that the District had a "really narrow" view of acceleration as a whole, which resulted in no agreement concerning acceleration for the Student (NT 37).
- 24) Regardless, the District added some additional detail (that did not include acceleration) to the Student's GIEP and issued a new GIEP, also dated December 17, 2014 ((S-7); (NT 57).
- 25) The Parties then proceeded to mediation at some point that is not clear on the record (NT 50-51).

26) Mediation was not successful and the Student's mother refused to sign the "new" GIEP (S-7). Despite the lack of agreement, the District eventually implemented the GIEP anyway (NT 53-57).

27) The "new" GIEP (S-7) is currently in effect and being implemented by the District (NT 57).

28) The Parties have agreed that the only acceleration the Student's mother is specifically requesting in this matter is for the Student to be accelerated in math and in science.

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

¹ 22 Pa. Code § 16.2.

case, then, the burden of proof lies with the Parent. 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 Parent in this matter has brought one issue to the attention of the Hearing Officer. Specifically, the Parent's 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 Student's GIEP should provide gifted services that include acceleration in math and science for the Student. The District argues that the Student has not shown any need for acceleration, as the Student has not shown sufficient understanding of the curriculum for the grade that the Student is currently assigned. The Parent, on the other hand, believes that acceleration is necessary, as the Parent insists that the Student wants and needs to be challenged and that the District's gifted program, which does not include acceleration for the Student, is not appropriately designed for the Student's need to be challenged.

Frankly, this case is a bit troubling, as the Parties appear to be on two totally different tracks concerning the education of the Student. As a clear example of this, the Parties were attempting to prove two somewhat related, but totally different, points during the hearing. The Parent is convinced that acceleration is necessary in order for the Student to obtain an appropriate gifted education at the District. However, most of the Parent's case concerned how she told the District about different forms of acceleration that could/should be considered for her child. The Parent put on a fairly clear case that she had informed the District of the many forms of acceleration that were available for the Student. The Parent also clearly presented that the District's idea of acceleration was "limited" during GIEP discussions. The District, for its part, did not directly refute the Parent's case, *per se*, and spent virtually no time at the hearing trying to defend its views on acceleration in general (whatever those views may be). Instead, the District concentrated its efforts at showing that there is no evidence that the Student requires *any* type of acceleration. The District indicated that it is providing enrichment in both the classroom and through a pull-out program for the Student. However, the District also indicated that the Student's needs are being met through those services, and that acceleration is not warranted. As such, the District believes that since acceleration is not called for in this particular case, there was no need to even discuss its views on

acceleration (my understanding of the District's case is that if the Student does not need to be accelerated, then the form of the acceleration is not relevant).

Because of this “disconnect,” the burden of proof becomes very important for this hearing. In the present case, since the Student's mother brought this case, the burden is on her to prove that the Student does, indeed, require acceleration in math and/or science moving forward (*E. N. v M. School District*).

Initially, it appears clear that the Student's mother has, in fact, proven that the District's views on acceleration are limited, at best. The Student's mother testified, credibly, that she made the District aware of the many forms that acceleration can take and that the District rebuffed (either directly or indirectly, the record is not clear) any form of acceleration for the Student. For example, during the hearing, the Parent specifically referenced the practice of “telescoping” (NT 40, 48) as a concept that she brought to the District's attention.² The District, as stated above, did not really address this issue with any testimony or evidence. As such, the Parent has shown that the District's views on acceleration are, in fact, limited. This is, admittedly, partly because the only evidence on the record indicates that the District did not discuss, in great detail, any forms of acceleration. I am left to wonder, even after a hearing and testimony, why the concepts were not discussed in any great detail. It is unclear if the concepts were not understood by the District, or if the concepts were talked about and then rejected for reasons not evident at this time. Regardless, the only evidence that is before me is that the Student's mother brought up a number of forms of acceleration that were all rejected in some fashion by the District.

Unfortunately, neither “enrichment” nor “acceleration” is defined by Chapter 16. However, The Pennsylvania Department of Education's (“PDE's”) “Gifted Education Guidelines” dated May 2014 provide more detail. While I understand that these are simply guidelines and do not carry the full force and effect of law, I do find the Guidelines helpful in situations such as this

² “Telescoping” is when a student is provided instruction in a subject area in less time than normal. For example, a student could be taught one year of material in only three (3) marking periods. While telescoping is similar to compacting, the big difference is that telescoping moves the student along to the next level upon completion of the required curriculum. In the example above, after completing the curriculum in only three (3) marking periods, the student would then begin working on the next year's curriculum during the fourth (4th) marking period. Compacting, on the other hand, allows the student to engage in alternative or enrichment activities while the rest of the class “catches up” with the accelerated student, thus normally keeping the student in the same general curriculum as his/her peers.

case where the regulations are not as complete as one may like. Under Chapter 3 of those Guidelines, there are fully twenty-one (21) forms of acceleration listed. While not all of them would be applicable in this case, there were far more options available to the District to consider than the limited idea of acceleration that the District appears to use. The District *must*, therefore, be more open to acceleration and the different forms it takes moving forward. Limiting its vision as expressed by the Student's mother in this hearing is simply not acceptable or proper.³

However, while this is certainly disturbing in some fashion, it does not determine the ultimate issue of this case. Instead, the Parent must show that the Student did, in fact, *need* acceleration. The regulations indicate clearly that "gifted education for each gifted student... is based on the unique needs of the student, not solely on the student's classification" (22 Pa. Code §16.2(d)(2)). Moreover, gifted education "enables [the student] to participate in acceleration or enrichment programs, or both, as appropriate..." (22 Pa. Code §16.2(d)(3)). Accordingly, districts are required to look at enrichment opportunities *and* acceleration opportunities (or a combination of the two) when dealing with gifted students. This is necessary in order to determine if that student's individual needs are being met in a proposed gifted program.

The Parent in this case, then, must prove that the Student is, in fact, in need of acceleration in order to be properly educated. After reviewing all of the evidence, hearing the testimony, and then also studying the transcript and documents a second time, I simply do not know if the Student needs acceleration or not. Instead, I see only bits of conflicting evidence. While the Student's mother clearly believes that her child is not pleased with the Student's current situation in school, it is also clear that the Student never made this known in the classroom. Both the gifted and regular education teacher testified credibly that the Student has never appeared to be bored or frustrated in class (NT 76, 104). While I certainly do not expect the Student to regularly tell the Student's teachers that the Student is "bored" in class, I would expect the teachers to see some signs of this

³ Nor is it proper for the District to reject acceleration because of the Student's clearly discernable desire to be "social" in the classroom. Specifically, the District indicated at the hearing that acceleration was not proper for this Student due to the fact that acceleration would leave the Student "alone" and without the socialization that the Student obviously craves (NT 83). While this may be a valid observation of the Student's social skills and desires, it is irrelevant to the determination of whether acceleration is *educationally* necessary for the Student. I would thus caution the District to not take such factors into account when making gifted programming decisions.

boredom. However, both teachers testified that they did not see such signs in the classroom (NT 104, 109).⁴

Next, the Student's test scores and work seem, at times, to be fully what one would expect from a student who needs to be challenged more by the curriculum. However, there are an equal (or perhaps greater) number of instances where the record indicates that the Student is doing well, but certainly not well enough to require acceleration. This leads me to consider the fact that the Student's processing speed is, to some degree, an issue here (FF 4). While the Student's processing speed is well within the "normal" range, it is, for this Student, a relative weakness. It is simply not clear, on the record, what influence, if any, that the Student's processing speed has on the Student's testing and assessment performance. Moreover, the Student seems to do well on assessments and tests often enough that the Student's processing speed, while of some concern, does not appear to be a large factor in the Student's overall performance.

The bottom line is that, as stated above, I truly cannot tell from the record if this Student is in need of acceleration or not. And, legally, since the burden lies with the Parent in this case, I am left with only one conclusion: that the Parent has not met her burden of proving the need for acceleration. I simply do not see the evidence to support the concept that this Student must be accelerated in order to be properly educated.

That being said, however, I would like to make several other statements concerning the education of the Student in this matter that may be of some assistance moving forward. While I realize that these statements would properly be seen as *dicta*, I also believe (in the best interest of the Student) that these comments should be made.

First, as stated above, the District needs to expand upon its view of acceleration. While grade skipping, subject skipping, and unit skipping are all forms of acceleration, they are not the

⁴ There was credible testimony from both parties that the Student's self-advocacy skills are a relative weakness (NT 104, 109). Thus, it is even more unlikely that the Student would ever mention any type of dissatisfaction with the curriculum to the teachers. However, there is also no indication that the Student's mother told anyone at the District that the Student was bored, or needed to be challenged more. There was thus no reason for the teachers to be looking hard for signs of boredom or frustration. All reference to the Student's state of mind were that the Student "wants" to be challenged, not that the curriculum failed to challenge the Student.

only forms available. There are good resources available through various internet sources that explain the different types and forms of acceleration.

Second, the District needs to be more concerned about individualizing GIEP's. While there is no evidence to support the idea that this particular Student has needs beyond the generalized program that the District has set up here, it is not readily apparent that the program would be a proper "fit" for all students (or, even for this Student with additional evidence). The Student's mother properly indicated in her Complaint that GIEPs must be individualized and that a "one size" GIEP does not fit all. Here, again, the lack of evidence concerning the need for acceleration allows the District to prevail in this instance, but there are clear "holes" that need to be addressed and filled in its program.

Third, now that there is notification, albeit through the hearing process, I would urge the District to pay close attention to the Student here and the Student's academic needs going forward. It is too much to expect a student that is of the Student's age to self-report boredom and frustration in a classroom setting. I do not believe that the District had any real reason to be looking for such traits in the Student here; nor do I believe (based upon the lack of evidence) that there were signs that the Student was bored and/or frustrated in class. However, now that the issue has been raised, I would hope that the Student's teachers will be vigilant in looking to see if the Student is actually okay with the work being done in the classroom as opposed to being bored and frustrated and simply "covering it up" through the Student's "social" behaviors.

Next, since the Student's processing speed is a relative weakness, I think that the parties should be deciding if the issue is masking even greater skills in the Student. There were "hints" in the testimony that the Student may have been able to perform even better on assessments and tests except for some timing issues (e.g., NT 63-64). While there is no hard evidence to prove that this truly is an issue, I believe that it would be beneficial for the Student to have the Parties at least keep this in mind when creating the next program for the Student.

Next, the District should be careful about implementing a GIEP while there is ongoing litigation. 22 Pa. Code §16.61(b) states as follows: "A change in the identification, evaluation, educational placement or GIEP of a gifted student may not be made during the pendency of an

administrative or judicial proceeding unless agreed to by the parties to the hearing.” Here, the timing of the unilateral implementation of a “new” GIEP for the Student is not clear on the record. However, the District should be aware of this provision in the future.

Finally, I would simply urge the Parties to work together to find creative ways to educate the Student in this case. Because the record is relatively small in this matter, I cannot make any specific recommendations concerning the education of the Student. However, some creative thinking and some willingness to compromise with each other for the benefit of the Student would be very helpful. There is no one “right” way to educate a gifted student. Here, the Student’s mother showed that the District’s thinking, at least at it pertains to acceleration, is limited. Moving beyond the current program would most likely be beneficial to the Student in this matter. Again, these are not requirements that I am placing on the District. I am simply making suggestions from an objective standpoint that I hope will help the Student’s education moving forward.

In this particular matter, as the Parent has failed to carry her burden of proving that acceleration is necessary for the proper education of the Student, I will issue an Order in favor of the District and dismiss this case with no further remedy to the Student. All other aspects of this case that are not discussed herein are likewise dismissed.

ORDER

In accordance with the findings of fact and conclusions of law set forth above, it is hereby ORDERED that the Parent failed to sustain her burden of proof and that this matter is hereby DISMISSED, in its entirety, without further remedy.

Shawn D. Lochinger

Shawn D. Lochinger
HEARING OFFICER

Date of Decision: May 8, 2015