

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

Child's Name: S. D.

Date of Birth: [redacted]

Dates of Hearing: 7/19/2016

Open HEARING

ODR File No. 17651-15-16

Parties to the Hearing:

Representative:

Parents
Parent[s]

Parent Attorney

Local Education Agency
Central Dauphin School District
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Harrisburg, PA 17109-5227

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Date Record Closed:
Date of Decision:

July 19, 2016
July 29, 2016

Hearing Officer:

Charles W. Jelley Esq. LL.M.

Background and Procedural History

The Parents filed a Chapter 16 Gifted Education Due Process Complaint, alleging a denial of a Free Appropriate Public Education (FAPE) for the 2016-2017 school year.¹ The parties agree the Student is gifted in Math as well as several other curricula areas. Initially, the District filed a Motion to Dismiss contending the Parents' claim was not ripe for review. After hearing oral argument, the Motion to Dismiss was denied. The matter proceeded to a one-day hearing at which time the Parents presented one witness, and the District presented three witnesses. The District presented twelve exhibits; the Parents presented eight exhibits; all exhibits were admitted and carefully reviewed in making this decision.

This dispute is about whether the Student should take Honors Geometry as a 9th grade high school freshman. The District contends the Student completed the 9th grade Honors Geometry as an 8th grade middle school student and therefore should not take Geometry in 9th grade. The District further contends the Student should instead enroll in Honors Algebra II. The Parents counter the District's contention arguing the Student's 9th grade course selections were built around taking Honors Geometry and AP US History. The Parents next contend that to change the agreed upon GIEP and modify the course selections would require the Student to drop AP US History. The Parents next argue that the Student's February 2016-2017 pendent IEP includes a goal and short-term objectives for 9th grade Honors Geometry. The Parents argue that it was the consensus of the Student's teachers, the GIEP team, and the Parents that the Student should not take AP US History and Honors Algebra II. The Parents filed the due process complaint upon learning from a variety of District administrators that the Superintendent, after a private meeting, contrary to the GIEP, decided the Student would not be permitted to take Honors Geometry.

I have reviewed the transcript of the testimony of the four witnesses, the District's twelve exhibits, and the Parents' eight exhibits. All exhibits were admitted into the record, all testimony was reviewed, and I am now prepared to rule. Based upon a preponderance of the evidence I find in favor of the Parents. I find that the February 2016-2017 Gifted Individual Education Program (GIEP) is appropriate.

¹ Student, Parents and the respondent District are named in the title page of this decision and/or the order accompanying this decision; personal references to the parties are omitted here in order to guard Student's confidentiality.

Issue

Is the Student's 2016-2017 Gifted Individual Education Program appropriate?

Findings of Fact

1. The Student is described as a multi-talented gifted individual in all content areas of the curriculum (S#1, P#2, NT pp.74-75 NT p.261).
2. On January 27, 2016, the Parents attended an information meeting at the high school describing how incoming 9th graders select high school courses (P#8, NT p.78).
3. On or about February 2, 2016, the Parents and the Student received a form listing the 9th grade school year course offerings (P#8).
4. On February 8, 2016, the mother spoke with the 9th grade guidance counselor at the middle school and the high school (P#8, NT pp.78-80). Aware of the fact the Student is gifted and taking 8th grade geometry, the high school guidance counselor recommended that the Student take Honors Geometry as opposed to Honors Algebra II (P#8, NT pp.78-80). During the call, the mother learned from the guidance counselor, that the high school guidance counselor would not recommend that the Student take Honors Algebra II at the same time as both courses require a lot of out of class time (P#8, NT pp.78-80). The mother shared the high school guidance counselor's advice with the middle school guidance counselor, the gifted teacher and the Student's 8th grade Geometry teacher (P#8, NT pp.81-84).
5. When students select 9th grade courses, they must ask the 8th grade instructor of record to recommend the student to take the courses the Student selects (NT pp.84-89). When the Student took the form to the staff the English teacher recommended the Student take Honors English, the Social Studies teacher recommended the Student take AP US History, the Science teacher recommended the Student take Honors Biology, the math teacher recommended the Student take Honors Algebra II ((P#4, p.1).
6. On February 8, 2016, the mother talked to the gifted teacher who recommended the Student take Honors Algebra II (P#8, NT pp.78-80). After informing the gifted teacher about what she learned in talking to the guidance staff, the gifted teacher agreed the Student should take Honors Geometry and AP US History (P#4, S#1, P#8, NT pp.78-80).
7. On February 10, 2016, the mother spoke to the Geometry teacher about his recommendation. After talking to the Geometry teacher about the guidance counselor's concerns, the Geometry teacher reversed his recommendation and signed off on the Student taking Honors Geometry (P#4, P#8, NT pp.78-80).

8. On February 11, 2016, the Mother attended an already scheduled Gifted Individual Education Program (GIEP) meeting for the Student and sibling, who is also a gifted student (P#3, P#8, S#1, NT pp. 89-90). At the GIEP meeting, the GIEP team reached a consensus that the Student should take Honors Geometry and AP US History (P#8, NT 90-99).
9. The District Local Education Agency (LEA) representative charged with the authority to commit resources towards the Student's GIEP services was not present for the entire GIEP meeting; however, when the LEA representative arrived near the end of the GIEP meetings the 9th grade course selection was reviewed as was the GIEP (S#1, NT pp.137-140). The Parent, the gifted teacher, and the LEA signed off on the GIEP (NT pp.137-138).
10. The GIEP cover page notes the GEIP covers the 2015-2016 and the 2016-2017 school years (S#1, p.1, P#3 p.1).
11. The GIEP includes feedback from all teachers, the social studies teacher notes the Student has a grade of 97% and needs to continue to develop reference/research skills, extend/enrich curricular concepts and to continue to receive independent projects (S#1 p.6). The math teacher commented the Student has a grade of 93% and needs to receive opportunities to discuss multiple answers and to encourage the Student to take risks when problem solving (S#1 p.6).
12. The GIEP includes a math goal (S#1 p.6). The math goal provides that when given 9th grade math standards, the Student will apply math skills and concepts to a mastery level (S#1 p.6). This math goal includes three short-term objectives with multiple sub-parts. The projected level of achievement is 90% (S#1 p.6). The math goal also includes specially designed instruction with a projected start date of February 12, 2016, with an anticipated duration ending in February of 2017 (S#1 p.6). The remaining portions of the GIEP dealing with reading and language arts are not in dispute (S#1 p.6).
13. The gifted teacher provided the Parent with a Notice of Recommended Assignment (NORA) outlining the proposed action of placing the Student into the high school Gifted program with the GIEP and specially-designed instruction (NT pp.236-238). The Parent immediately consented, executed, and returned the NORA to the teacher (NT pp.236-238). The NORA is on file with the District. The NORA was not provided by either party as an Exhibit (NT p.236-238).
14. On March 18, 2016, the LEA/middle school building principal, who attended the GIEP meeting, called the Parents and informed them it was against school policy for the Student to take 9th grade Honors Geometry. The LEA announced, "Geometry is off the table" (P#8, NT pp.98-99). The Parent then consulted with the high school guidance counselor who confirmed that a new policy prohibited the Student from taking Honors Geometry (P#8, NT pp.98-

- 100). At no time during the course selection process or the GIEP process did the Parents, the high school guidance counselor, the middle school guidance counselor, the gifted teacher, the math teacher or the LEA/principal know about the policy/guideline restricting 8th grade Geometry students from taking Honors Geometry (NT p.97).
15. On March 23, 2016, the Parents met with the high school principal who also confirmed what the principal stated, that the Student could not take Honors Geometry (P#8, NT pp.99-100).
 16. On March 31, 2016, the District Director of Curriculum, Instruction & Assessment emailed the Parent stating that the middle school principal, assistant principal, the assistant superintendent and the superintendent conferred, and all agreed the Student could not take Honors Geometry (S#5).
 17. The District Director of Curriculum, Instruction & Assessment referenced the District's Academic Planning Guide, several curriculum maps for the Honors Geometry, middle school Geometry, and College Placement Geometry as the basis for the superintendent's decision not to allow the Student to take Honors Geometry (S#5pp.100-104).²
 18. The District Director of Curriculum, Instruction & Assessment was the first person in the District to tell the Parents that the Student's 8th grade Geometry was essentially 9th grade Honors Geometry, used the same curriculum maps as the 9th grade Honors Geometry class and the same test bank of questions as Honors Geometry (S#5, NT pp.100-104).
 19. The District Director of Curriculum, Instruction & Assessment stated that the 8th grade and the 9th grade classes use the same book and the same curriculum maps (P#5, NT pp.100-104).
 20. The 8th grade Geometry teacher previously taught Honors Geometry at the high school; the teacher uses the same test bank of questions used by the high school Honors Geometry teacher (NT pp.249-251). The 9th grade Geometry teacher covered ten and a half out of 11 units in 8th grade Geometry (NT pp.250-252). When he taught Honors Geometry at the high school, he usually completed all 11 units (NT pp. S#12, NT pp.250-252). The Student earned a 92% in 8th grade geometry (S#8).
 21. Although the Student earned a 92% in 8th grade Geometry, the District does not offer high school credit for the 8th grade Geometry class performance (NT pp173-175).

² Curriculum maps identify the course content the teachers are expected to teach and are aligned with the state standards for education.

The Planning Guide Controversy

22. The District Planning Guide provides that all students in grades 9 through 12 can take College Prep Geometry for credit (S#3 p.1, S#4 p.15, NT pp.151-156). Only 9th grade high school students can take Honors Geometry for credit (S#2 p.1, S#4 p.15).
23. Students who take Geometry in the middle school may retake high school Geometry in the College Prep class (S#1 p.6). High school students who take Geometry in high school and pass Geometry may not take Honors Geometry (S#4, p.15).
24. At the time, the GIEP was developed, and the Complaint was filed, the Student was in middle school (S#1, P#6).
25. Sometime after the math teacher signed off on the Honors Geometry class (P#4), the gifted teacher and the GIEP team developed the GIEP (S#1), someone in the administration asked the gifted teacher and the math teacher to provide the administration with written statements stating what math course the Student should take in high school. Both staff members opined then and at the hearing, the Student should take Honors Algebra II (NT p.220, NT p.239, S## 11-12).
26. The math teacher and the gifted teacher qualified the written recommendations and testimony about Honors Algebra II as a math only recommendation (NT p.220, NT p.239, S## 11-12). Neither the math teacher nor the gifted teacher expressed any opinion about the effect on the Student's FAPE right if the Student did not take AP US History or how it would affect the Student's 10th grade, 11th grade or 12th grade course selections (NT pp.161-162, NT pp.245-247).

Applicable Legal Principals

Gifted Education

Gifted education can include acceleration and/or enrichment programs provided according to the student's intellectual ability and academic needs.³ The district has an obligation to identify and provide an appropriate program for students who are gifted and in need specially designed instruction beyond that which is provided in the regular education program. School districts must provide gifted students "with a plan of individualized instruction (an 'appropriate program') designed to meet 'the unique needs of the child.'"⁴ A school district's "obligation is not without limits... [T]he instruction to be offered need not 'maximize' the student's ability to

³ 22 Pa Code Chapter 16 *et seq.*

⁴ Centennial School District v Department of Education, 517 Pa. 540, 539 A.2d 785 (1988).

benefit from an individualized program.” *Id.* A school district must devise a program of “appropriate specially designed instruction based on the student’s need and ability” and ensure that the student “is able to benefit meaningfully from the rate, level, and manner of instruction” while providing opportunities for acceleration or enrichment or both as appropriate.⁵ School districts need not offer or provide gifted educational programming that goes beyond its own existing curriculum.⁶

Although Chapter 16 does not speak to the burden of proof in gifted due process proceedings, the burden, here like in other matters, lies with the party that initiated the request for due process.⁷ In this case, then, the burden of proof lies with the Parents as the moving party. Chapter 16 provides parents and district with certain procedural safeguards.

Consent and Procedural Safeguards.

22 Pa Code §16.61. Notice provides:

(a) A school district shall document the provision of written notice to the parents of a gifted student at least **10 school days prior** to one or more of the following events:

(1) The school district proposes to conduct a gifted multidisciplinary evaluation or reevaluation of the student.

(2) The school district proposes or refuses to initiate or change the identification, evaluation or educational placement of the student, or proposes or refuses to make any significant changes in the GIEP.

(b) **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 proceeding.

(c) The content of notices to the parents **shall be written in language understandable to the general public.** If necessary, the content of notices shall be communicated orally in the native language or directly so that the parents understand

⁵ 22 Pa. Code § 16.41

⁶ Centennial, 517 Pa. at 552-53, 539 A.2d at 791.

⁷ It is the responsibility of the Hearing Officer to make credibility determinations and to assess the weight to be accorded the evidence. *E. N. v M. School District*, 928 A.2d 453 (Pa. Commw. 2007).

the content of the notices.

(d) The notice shall include:

(1) **A description of the action proposed or refused** by the district, an **explanation** of why the district **proposes or refuses** to take the action and a description of options the district considered and the reasons why those options were rejected.

(2) A **description** of each **evaluation** procedure, type of **test, record or report** used as a basis for the action.

(3) A **description of other factors relevant** to the district's action.

(4) A full explanation of the procedural safeguards, including the right to an impartial hearing available to the student or the parents under this chapter.

(e) The notice shall inform the parents of the following:

(1) The addresses and telephone numbers of various organizations which are available to assist in connection with the hearing.

(2) The timelines involved in conducting an evaluation, developing a GIEP and initiating a hearing.

(3) An outside evaluation submitted by the parents shall be considered.

(4) The information in §16.63 (relating to impartial due process hearing). (emphasis added).

Next, pursuant to 22 Pa Code Chapter §16.62 the notice provided to the parents at §16.61 provides:

(4) When completed, the GIEP provided for in §16.32 (relating to GIEP) shall be presented to the parents, along with a notice of recommended assignment signed by the school district superintendent provided for in §16.61 (relating to notice) and a notice of parental right to an impartial due process hearing under §16.63 (relating to impartial due process hearing).

The notice shall be presented to the parents in person at the conclusion of the GIEP conference or by certified mail within 5-calendar days after the completion of the GIEP conference.

(5) The parents shall have 10 calendar days to respond to a notice of recommended assignment sent by mail or 5 calendar days to respond to a notice presented in person at the conclusion of a GIEP conference. If the parents receive the notice in person and approve the recommended assignment within 5 calendar days, **the school district may not implement the GIEP for at least 5 calendar days**, to give the parents an opportunity to notify the district within the 5-day period of a decision to revoke the previous approval of the recommended assignment. (emphasis added)

Analysis

This action arises in a curious fashion; here the parties reached an agreement at a GIEP conference, then the District contacted the Parents and stated they would not implement the GIEP. In this dispute the roles are reversed, the Parents filed the action to enforce the IEP as written when the District refused to implement the GIEP. Oddly, although the dispute began in March of 2016, the District did not offer an alternative GIEP to correct the alleged error. Once the Parent was on notice of the District's anticipatory refusal to implement the 2016-2017 GIEP, the Parents filed the instant action essentially seeking a declaratory judgment as to the rights and responsibilities of the parties. The Parents ask the hearing officer to order the District to implement the agreed-upon GIEP. The District on the other hand argues that the GIEP was prepared, offered, and implemented in error. The District contends that the staff working with the Parents were unaware of a District's Academic Planning Guide, which they contend restricts what course selections the Student and the GIEP team can consider when developing a GIEP. The District relying on *C.C. v. Solanco School District*, ODR Case # 17252-1516KE (February 16, 2016) argues that pursuant to 22 Pa Code Chapter 4, the District has the final say over course selections. I disagree. In *Solanco*, the Parents wanted the GIEP team to alter the district's board approved grading policy; here the dispute is about the District's course selection guidelines, a matter well within the GIEP team's decision making responsibility. Therefore, I find *Solanco* is not applicable.

Our Commonwealth Court instructed in *B.G. v. Abington School District*, ___ A.3d ___, 2010 WL 3929000 (Pa. Commw. 2010) when parents agree with the goals, objectives, and assessment criteria in a GIEP, they cannot later argue that those elements of their child's program were insufficient. The opposite is also true, once a District offers a GIEP and the Parents execute the NORA accepting the program and the placement, the District cannot hold a meeting without the Parents and later argue that the elements of the Student's program are inappropriate.

The GEIP team included the Parent, the gifted teacher, and the LEA. The GIEP team reviewed the Student's progress, needs, and signed off on the Student

taking Honors Geometry and AP US History. Similarly, the Student's teachers, after discussing the course selection options recommended the Student take AP US History and Honors Geometry. The gifted teacher and the math teacher testified they revised their initial math recommendation when presented with the guidance counselor's recommendations that the Student should not take AP US History and Honors Algebra II. Aware of the fact that the teachers agreed to the Student's course selection, the GIEP team drafted a 9th grade geometry goal and accepted the recommendations of the teachers regarding course selection. The Parties do not dispute the fact that the AP US History will meet the GIEP language arts research-writing goal. The District's refusal to implement the GIEP was made without notice to the Parents or a GIEP team meeting. The unilateral decision not to implement the GIEP is contrary to the procedural due process guarantees in Chapter 16. The District decided in March 2016 not to implement the GIEP, since that time the District did not schedule a GIEP meeting or offer a revised NORA. The gifted teacher, the math teacher, and the administrator did not testify about what combination of courses the Student should take to receive FAPE. If the District's position is accepted, the Student will not have a GIEP or a course schedule when school starts in August.

The District is required to provide the Student services that will "... ensure the student benefits from or gains access to a gifted education program."⁸ The evidence is preponderant that the agreed-upon GIEP will provide the Student with FAPE. The evidence is preponderant that the GIEP process is now compromised by the taint of outside direction(s) on what class the Student should or should not take. The rejection of the Student's class selection, by the Superintendent outside of the GIEP process, was made without consideration of the Student's other areas of strengths. This type of outside influence is tantamount to a predetermination of the Student's program and placement. Accordingly, I find that the February 2016-2017 9th grade GIEP provides the Student FAPE. I also find the District failed to follow the procedural due process protections set forth at 22 Pa Code Chapter 16.61-62. The District is directed to implement the February 2016-2017 9th grade GIEP.

⁸ 22 PA code Chapter 16.32(b)(2)

ORDER

It is hereby **ORDERED** as follows.

The February 2015-2016 8th grade GIEP and the February 2016-2017 9th grade GIEP is appropriate. The District is directed to implement the SD#1 the 9th grade February 2016-2017GIEP. The anticipatory refusal to implement the GIEP did not result in a denial of FAPE requiring compensatory education. The failure to provide the Parents with a Notice of Recommended Assignment describing the District's proposed action, in this instance, was a harmless error as the Student was not prohibited from participating in the GIEP program or denied the benefits or access to specially designed gifted instruction.

Dated: July 29, 2016

Charles W. Jelley Esq. LL.M.
Charles W. Jelley Esq. LL.M.
HEARING OFFICER