

*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**  
**GIFTED EDUCATION HEARING OFFICER**

DECISION

DUE PROCESS HEARING

OPEN HEARING

Name of Child:

K.B.  
ODR #18562/16-17 KE

Date of Birth:  
[redacted]

Date of Due Process Hearing:  
January 11, 2017

Parties to the Hearing:

Council Rock School District

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

Pro Se  
Parent[s]

Mark Walz, Esquire  
Sweet, Stevens, Katz and Williams  
331 East Butler Avenue  
New Britain, PA. 18901

January 11, 2017

January 26, 2017

Vicki A. McGinley, Ph.D.

### **Background**

Student is an elementary school aged child residing in the Council Rock School District (hereinafter District) who is identified as gifted. The Parents (hereinafter Parents) requested the hearing because they do not agree with the proposed annual GIEP dated December 15, 2016, which would extend through the remainder of this school year, and into the first half of the 2017/2018 school year when Student will transfer to the middle school. Specifically, they contend the proposed GIEP is inappropriate in the area of mathematics, as they believe Student should be accelerated so as to be enrolled in 8<sup>th</sup> grade math upon entering middle school for seventh grade. The District counters that it has provided and offered an appropriate GIEP, and if it honored Parent's request, additional testing to assess student's 6<sup>th</sup> grade math skills would be needed. Thus, it is the District's contention that the present program is appropriate, that it has proposed an appropriate GIEP to meet Student's needs, and that since Parents have refused additional testing this hearing may have been requested prematurely.

For the reasons set forth below, I find in favor of the District.

### **Issues**

1. Did the District offer an appropriate GIEP in the area of Mathematics?

### **Findings of Fact**

1. Student is identified as qualifying for gifted programming pursuant to Pennsylvania Chapter 16 (22 Pa. Code §§16.1-16.65) in grade 6 for the 2016/17 school year.
2. Student receives the general education 6<sup>th</sup> grade curriculum, with math three days a week (NT. 35) and two days a week with a math specialist in an enrichment program (NT. 21; 45), where problem solving skills and strategies are addressed.
3. Student has a history of high achievement in math (NT. 33; P7; S12), and Parents began questioning the appropriateness of that curriculum as early as 5<sup>th</sup> grade in preparation for middle school.
4. District witnesses testified that the general education 6<sup>th</sup> grade math class, where Student is placed 3 days per week, is differentiated for high achievers in terms of assessments and homework (NT. 24; 44).
5. District witnesses testified that Student does not show evidence of mastering material when pretesting in the 6<sup>th</sup> grade math curriculum (NT. 24; 95), and that [Student] struggles with applying different strategies to solve a problem (S6).
6. On November 7, 2016, a draft GIEP was put forth by the District (S6) which included a goal in math for student to further develop problem solving and higher level thinking characteristics in [Student's] math enrichment class. Short term objectives included

addressing Student's rate of math skill acquisition, differentiation with enrichment, and acceleration of content as a need is demonstrated through the regular curriculum or math enrichment. This GIEP also noted that student would be given the opportunity to take the District's 6<sup>th</sup> grade math curriculum, based on grade level and other assessments, after completion of which the GIEP team would reconvene. Specially Designed Instruction supported the Math goal and objectives.

7. On November 11, 2016, (S4) District sent an email to Parents indicating that they reviewed parental input for the GIEP which contained a proposed Math goal. This correspondence indicated that the GIEP District team members needed to gather more data on Student's present levels, as in order to accelerate Student would need to demonstrate mastery in the complete 6<sup>th</sup> grade math curriculum.
8. On November 15, 2016, at a meeting (NT. 189-190), Parents provided an addendum to the November 7, 2016 proposed GIEP which outlined three options. The first was having a teacher provided by District 2X/week to tutor in pre-algebra topics consistent with the content of the acceleration test. The second would have Student learn pre-algebra using Khan Academy with teacher oversight. As a last alternative, they proposed that the District provide at its expense access to John Hopkins Center for Talented Youth Curriculum (S8). The District refused these options and a NOREP was issued on November 15, 2016 (S7) which Parents refused to sign.
9. There was testimony that a GIEP team meeting was reconvened on December 9, 2016 (NT. 84). Parents believed this a formal GIEP meeting, but the District disagreed since all team members were not present though they had all provided input.
10. In the December 15, 2016, the District proposed a number of options to address Student's needs, one specifically requesting pretesting the complete 6<sup>th</sup> grade curriculum by January 3, 2017, and then reconvening the GIEP team to consider all options. (NT. 204-205; S10)
11. Parents proposed compacting the 6<sup>th</sup> and 7<sup>th</sup> grade math curriculum in the present year, so Student would begin 8<sup>th</sup> grade Algebra in 7<sup>th</sup> grade at the middle school (NT. 21) which would require daily individualized instruction and accelerated pacing (NT. 21; 23). However, for it to consider Parents' request, the District proposed that Student demonstrate mastery of the remainder of the 6<sup>th</sup> grade year math curriculum (NT. 19; p. 23; S4; S10) with pretesting to be performed by January 3, 2017.
12. On December 15, 2016, District provided a draft GIEP which recommended that Student complete the 6<sup>th</sup> grade math curriculum (NT. 21) and potentially enter the middle school as a 7<sup>th</sup> grade math honors student (either in general math, but more than likely, based on testing, honors pre-algebra).

### **Discussion and Legal Basis**

**Burden of Proof:** The burden of proof, generally, consists of two elements: The burden of production (which party presents its evidence first) and the burden of persuasion (which party's evidence outweighs the other party's evidence in the judgment of the fact finder, in this case the hearing officer). 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 initiates 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. The Parents also assumed the burden of production.

**Credibility:** During a due process hearing the hearing officer is charged with the responsibility of judging the credibility of witnesses, weighing evidence and, accordingly, rendering a decision incorporating findings of fact, discussion and conclusion of law. Hearing officers have the plenary responsibility to “express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses (*Blunt v. Lancaster-Lebanon Intermediate Unit, 2003 LEXIS 21639 at \*28 (2003)*); See also generally (*David G. v. Council Rock School District, (U.S., E.D. Pa. 2012)*). The Parents proceeded pro se. Both parents were present at the hearing and mother testified. Some of the witnesses were summoned from their schools to testify while other witnesses were present for the entirety of the hearing. There were no credibility issues. Each witness presented as testifying to the best of her/her ability and recollection and this hearing officer deemed all witnesses’ testimony to be credible.

**Gifted Education:** 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. The education can include acceleration and/or enrichment programs and services that are rendered per the student’s intellectual /academic needs and abilities.

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’,” in the context of what is available in its existing regular or special education curriculum. See *Centennial School District v. Department of Education, 517 P. 540, 539 A. 2d 785 (1988)*, interpreting 22 Pa. Code 16.1 et. seq. 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.* It still must, however, provide a placement that ensures appropriate specially designed instruction reasonably calculated to provide meaningful or more than trivial educational benefit and student progress from the rate, level and manner of instruction. See 22 Pa. Code 16.1(vii), 22 PA code 16.41(b)(2), and *Centennial*. Such a placement also has to provide opportunities to participate in acceleration or enrichment or both, going beyond the program that student would receive as part of a general education. See 16.41(b)(3).

The Parents, as agreed to by the District at the inception of the hearing, assert the issue here to be whether the Student’s proposed GIEP (dated, December 15, 2016) is appropriate to meet Student’s needs in the area of mathematics. Consequently, I do not reach separately Parents’ prehearing and testimonial assertions that the District may be generally making decisions as to acceleration in an arbitrary and capricious manner. Indeed, such is irrelevant to the only issue before me which is appropriateness of the aforementioned GIEP, and my jurisdiction to address such systemic matters is questionable. Moreover, prevalent matrices for eligibility that Districts use were not at issue, since eligibility is not contested here. Thus, consistent with the aforementioned parameters of the burden of proof, it was the Parents’ burden to establish that the proposed GIEP was inappropriate to meet Student’s individual needs without additional acceleration.

Parents testified that through their research, there are three areas to be considered for a decision related to acceleration: Aptitude, Achievement and IQ scores. (NT. 20). The GIEP team members, in testimony and evidence have shown that they considered all three areas identified by Parents when making decisions concerning instruction for student (NT. 134). Likewise, that testimony also made it clear they were aware of the procedures needed to consider decisions around acceleration of students. Expert witnesses from the District pointed to aptitude, a natural ability to do something, as questionable in some areas of math. Specifically, regular and enrichment math teachers testified that, notwithstanding 94<sup>th</sup> percentile and 133 IQ testing results, Student was sufficiently challenged in the present math placement given data showing only some conceptual mastery below the highest levels and some word problem weaknesses (NT. 39, 70, 250).

Essentially acceleration took place as Student's general 6<sup>th</sup> grade math curriculum was compacted into a three-day week. Thus, Student was required to learn in three days, what other student were learning in five days. Additionally, this three-day instruction, as well as the two days of enrichment, was differentiated to address Student's individual level. Parents' proposal would require that the Student receive individual program outside or beyond the district's existing regular and special education curricular offerings, such as Khan Academy and/or an individual teacher to work with the Student on a daily basis. As stated above, Gifted education is limited to the education available within the curriculum in the school district. Pennsylvania law does not require districts to provide "elective individual programming outside or beyond the district's existing regular and special education curricular offerings". However, the main argument persuading this Hearing Officer to rule in favor of the District was testimony from multiple team members that Student is sufficiently challenged in [the] present math placement. An integral part of that argument was pretesting data, establishing there is not overwhelming evidence of mastery of concepts and although after instruction, as Parents indicate, Student performs well, there are times when Student is not performing at the highest level on assessments. Thus, following from that, the main concern of the District GIEP team members, specifically the general education math teacher and the enrichment math specialist, is the Student's limited ability to perform math problems within word problems or real life situations. Testimony indicates that "Student does not explain [Student's] reasoning; [Student] can compute quickly, but [Student] does not solve problems quickly or in multiple ways". (S6, NT. 80-81). Scores in enrichment (P7) are satisfactory and commendable (NT. 77, S10). Essentially, both the general education math teacher and the enrichment math teacher note satisfactory, improving performance, but an overall continuing need in problem solving, an area that is standards based and will increase in complexity, establishing remaining need at the present level of instruction for Student as [Student] is at the bottom half of the enrichment class (NT. 93, 106).

Despite this, the District was prepared to have Student assessed to consider acceleration, but prior to doing so Student would need to take the end of year 6<sup>th</sup> grade assessment by January 3, 2016 (NT. 148-149; NT. 204-205). Parents rejected this opportunity, as their belief is there was a possibility that Student may have done poorly due to needing instruction. The District indicated that this curriculum-based assessment was important and needed as it would tell what student had mastered or not, and as such what would be important and needed to be taught.

Additionally, it was noted by the District, that some students in the past that have been accelerated have demonstrated mastery on the complete year's curriculum (NT. 159).

It was clear, through Parent's testimony, that a main concern was 7<sup>th</sup> grade Math instruction, regardless of District testimony that an end of year test would be needed to determine placement and that the GIEP team would then reconvene in August 2017 (NT. 228; S10). Additionally, and apparently disregarded by Parents, the District testified that there is practice in the District for students to skip honors pre-algebra 7<sup>th</sup> grade and go into honors algebra 8<sup>th</sup> grade when test scores indicate that it would be an appropriate placement (NT. 103). Parents' evidence also pointed to Student being unchallenged in the present placement, as [Student] wrote in fifth grade about, "hoping that math enrichment would be more challenging" (P10). That was in response to Parents presenting a question to [Student] about the wish to do a lot of work needed to compact the 6<sup>th</sup> grade and 7<sup>th</sup> grade math curriculum (NT. 120-121). Coming well before the current testimony of both the general education and math enrichment teacher, noting no problems with student being bored or unchallenged in work (NT. 92), this parentally prompted evidence cannot carry greater weight.

Based on the preponderance of evidence being in the District's favor, Parents have not met their burden of proof and student's present placement/program is appropriate, as is the proposed GIEP and even though systemic issue was before me, the District has provided an appropriate program for this student.

### **Order**

Since the Parents did not present a preponderance of evidence that the District offered an inappropriate program, the District prevailed. Therefore, unless Parents decide to appeal this matter the December 15, 2016 will be implemented.

Vicki A. McGinley, Ph.D.  
Hearing Officer

**Date of Decision: January 25, 2017**

