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PENNSYLVANIA

SPECIAL EDUCATION HEARING OFFICER

DECISION

Child's Name: JG

Date of Birth: xx/xx/xx

Date(s) of Hearing February 23, 2007, February 26, 2007, March 7, 2007

OPEN HEARING

ODR NO. 7259/06-07 AS

Parents

Mr. and Mrs.

Parents' Representative:

Pro Se

School District:

Carlynton S.D.
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Carnegie, PA 15106

District Representative:

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Date Final Transcript Received: March 13, 2007

Date Closing Arguments Received: March 7, 2007

Date Record Closed: March 13, 2007

Date of Decision: March 28, 2007

Hearing Officer: Margaret Drayden, Esq.

Précis

Student is xx years old, diagnosed as having a dual exceptionality – giftedness and a specific learning disorder in reading (dyslexia). He has received gifted services since 2d grade when a school psychologist evaluated him and student had a WISC-III Full Scale IQ score of 137. In the 2000-01 school year (4th grade), parents had Student assessed by private school psychologist; the results at that time of the WISC-III was a Full Scale IQ score of 151. Since that time, Student has had 3 IQ evaluations with scores below 130.

A series of due process hearings have ensued over the proper programming including one where the District filed based on concerns regarding Student's continued eligibility for special education. Now, Parent filed requesting, *inter alia*, that the Hearing Officer find Parent's IEE should be the basis of the District's Reevaluation Report (RR) wherein Student is found dually diagnosed and be the basis for the new IEP. The District requests a finding that Student no longer qualifies for as a special education student for either giftedness or a specific learning disorder.

Findings of Fact

1. Student's date of birth is xx/xx/xx and he is a resident of Carlynton School District (District). (SD-14.)¹
2. Student is receiving special education services as a child identified with a dual diagnosis of giftedness and a specific learning disorder. (Id., SD-15.)
3. 9/24/06 - this Hearing Officer conducted a prior hearing, ordered a RR, and ordered the District to compose a list of certified school psychologists and speech and language pathologists and provide said list to Parent. Parent was to choose from the list and advise the District within 10 school days. (P-1; NT at 84.)
4. 10/04/06 - The District complied and mailed said list. (SD-1, SD-13.)
5. 10/9/06 - Parent called and spoke with Dr. L, the Acting Pupil Services Director for the District, and asked that the [redacted] Center (Center) be approved to conduct the re-evaluation. Dr. L responded that she was to choose from the list. (SD-13.)
6. 10/10/06 - Parent called and told Dr. L that she was taking Student to the Center for an evaluation. (Id.)
7. 10/11/06 or 10/12/06 – Parent spoke with Mr. H, No. 7 on the District's list, who informed her he would not do the evaluation. (Id., P-4.)
8. 10/12 and 10/16/06 – the Center conducted its IEE. (NT at 47.)

¹Parents' exhibits are noted as "P-"; District exhibits are noted as "SD-"; Hearing Officer exhibits are referenced as "HO-"; Noted Transcript is referenced as "NT"; Findings of Fact are noted as "FF".

9. 10/13/06 - Parent returned an IEP and NOREP. On the NOREP, Parent had written she was approving it only until the evaluation was conducted and then the IEP would need to be reopened. (Id.)
10. 10/16/06 - Parent emailed the District that she'd chosen Mr. H from the list and that she had already had an IEE conducted on 10/12 and 10/16/06 and that she would provide a list of tests used so they would not be repeated. (Id., SD-2; NT at 69, 143.)
11. Dr. L spoke with Mr. H to set up the evaluation. He stated he told Parent he would not do the evaluation. Parent led Mr. H to believe he might not get paid for the evaluation. Dr. L assured him that was not the case. (SD-13.)
12. Mr. H has 2 Masters' degrees – one in reading instruction, is a certified teacher, reading specialist and school psychologist. He has “all but dissertation” (ABD) completed for his Doctorate. Mr. H has conducted between 5,000-7,000 evaluations during his career. (NT at 94, 236, 253, 259-60, 280.)
13. 10/18/06 - Dr. L spoke with Parent and confirmed she had received Parent's email re Mr. H and that she was just waiting for him to rearrange his schedule and give her some testing dates. (NT at 89.)
14. 10/19/06 – Dr. L sent Parent a certified letter stating Mr. H would do the evaluation. (Id.; P-2.)
15. 10/22/06 – Parent emailed a list of 11 tests the Center used.
16. 10/23/06 – Parent emailed that she changed her mind re which certified school psychologist she wanted to test Student. Dr. L emailed Parent that the last day to make a choice was 10/20/06 and the District had already scheduled Mr. H and the speech and language (S/L) pathologist. (SD-3, SD-13; P-4.)
17. 10/24/06 – 11:41 a.m. Parent emailed District with another certified school psychologist's name that she preferred (No. 6) and that she had inadvertently typed Mr. H's name. (P-4; NT at 24, 71-73.)
18. 10/24/06 – 9:49 p.m. Parent emailed District with yet another certified school psychologist's name and phone number (No. 5), stating she was available and would do the testing. (SD-4.)
19. 10/25/06 – District emailed Parent “evaluations are already in motion.” (Id.)
20. 10/25/06 – Parent emailed Dr. L that District's list had telephone numbers which were wrong or disconnected, that some of the professionals were not qualified or lacked certifications or did not have time to do the testing. She stated she felt the District does not want her to be part of the process and found it disturbing and again stated she wanted No. 5 to do the testing, despite it being 3 days past the deadline. (P-5.)
21. 10/26/06 – Parent reviewed the results of her IEE at the Center, but the Center did not mail the IEE to Parent until 1/25/07. (HO-7.)
22. As Parent did not choose a S/L pathologist, Dr. L picked a S/L pathologist who is a phonological expert. (NT at 97.)
23. 10/30/06 – Dr. L emailed Parent that the S/L pathologist would test Student on 11/2/06. (SD-5; NT at 94-95.)
24. 11/9/06 – Dr. L emailed Parent that Mr. H would begin Student's evaluation on 11/13/06 and that it would take 2 sessions. (SD-6.)
25. The District administered its RR testing after Parent's IEE (NT at 70.)

26. Parent had her IEE done before the District's was even scheduled (NT at 70-75.)
27. Parent stated she did not recall whether she arranged for the IEE at the Center before or after receiving the District's list of certified school psychologists. (NT at 79.)
28. The District's RR initially issued on 12/10/06 but did not contain the S/L evaluation, classroom observations, and history. (SD-7; P-6; NT at 98-101.)
29. Parent received the RR "in the middle of the holiday season" which was incomplete. (P-9; NT at 69, 142-43.)
30. The RR was updated in that it included a review of previous IQ testing. (P-9; NT at 98-101.)
31. The 12/10/06 was revised on 2/15/07 and incorporated the S/L evaluation and the current classroom assessments. (SD-7; NT at 101-102.)
32. The revised RR contained: an IQ section written by Dr. L; psychological testing by Mr. H; S/L evaluation by Ms. S; behavioral observations and classroom performance by Mr. Z. (SD-7; NT at 146-47.)
33. Dr. L testified that Student's reading weakness is in phonemic memory, but that his school work was "not really that adversely affected by this...I think that is borne out in his grades. In a very advanced English class, he holds his own with the other students." (NT at 125.)
34. Scholars English is an accelerated class but it is not an Advanced Placement class which would qualify for college credit. (NT at 127, 330.)
35. The Scholars English class is "weighted" which means if Student maintains at least an 85% average, he will receive 4.5 additional percentage points at the end of the year. Student current grades equates to a grade of 92.5 or 93%, which is an "A" grade. (NT at 335-36, 343.)
36. Student's 10th grade Scholars English grade for the first two 9-week periods is 88 and 89. (SD-9; NT at 127.)
37. Student volunteers to read aloud in class and although he occasionally mispronounces a word, it is nothing that other students haven't done as well. (NT at 333.)
38. The Learning Support (LS) teacher found Student's oral reading and writing skills were excellent. (NT at 382.)
39. Student does not require extra time for English assignments and does not avail himself of his Franklin Speller. (NT at 334, 340)
40. Student's English errors are typical of an advanced student and include punctuation and lack of concluding statements. (NT at 335, 354.)
41. Student's English teacher has never seen Student interact with the Learning Support teacher except to politely answer that teacher's questions. (NT at 336-37.)
42. The LS teacher testified that Student never requests help except he occasionally asks if a word is spelled correctly. (NT at 380-81, 389-90.)
43. The LS teacher is in the Scholars English class twice a week. (NT at 380.)
44. Student's English work folder included a quiz for Silas Marner where he correctly answered 19 out of 20 questions and Lord of the Flies where he correctly answered 16 out of 20 questions. (SD-17; NT at 338-342.)

45. Student's English work folder included scores where he answered 10 out of 10 questions correctly, 20 out of 20, 7 out of 10, 43 out of 50, 12 out of 15, 28 out of 30, 44 out of 50, and 10 out of 10. (SD-17.)
46. Student's English teacher has taught students with reading disorders during her 18 years of teaching but would not consider Student a child with a reading disorder; nor would she refer Student for an evaluation, based on his classroom performance. (NT at 342-43.)
47. Student's spelling ability waxes and wanes but his English teacher has not noticed anything which could be characterized as exceptional. (NT at 348.)
48. Student's English teacher testified that, as a teacher with 18 years' experience, there are gifted students in the Scholars class but that Student does not demonstrate giftedness and that his performance is not commensurate with gifted performance. (NT at 351-53.)
49. Student's English teacher opined that she does not see, in Student's work, the "undulation of ideas and the connection of ideas that [she does] in the gifted students." (Id.)
50. Student's IEP reflects Student receives modifications, not accommodations. (SD-14; NT at 136.)
51. Although Dr. L hypothesized that the 2000 IEE IQ scores could have been artificially inflated, she had no evidence upon which to base that conclusion. (NT @ 157-160.)
52. As Student was already identified as gifted, Parent's IEE, obtained in 2000, was simply accepted and placed in Student's file. (NT at 159.)
53. Student's 6th grade Terra Nova score in reading was the 99th percentile, but that is not a basis for a gifted designation; a gifted program is based on IQ and a need for academic enrichment. (NT at 167.)
54. Dr. L testified she had never seen a dyslexic student who could successfully learn a foreign language and handle the rigors of a second year foreign language class. (NT at 182, 561-62.)
55. Student is currently taking Spanish II where he has to translate and write in Spanish; his 2 quarterly grades this year are 97 and 92. (NT at 561; SD-9.)
56. The WISC-IV manual requires a minimum of 6 months before readministering the test to eliminate practice effect. (NT 211-12, 431-32.)
57. Because the Center administered the WISC-IV in October 2006, Mr. H administered the same test again in November "just for comparison" purposes but gave the Cognitive Assessment System to obtain a valid Full Scale (F/S) IQ score. (NT at 256, 285-87, 319-20.)
58. Mr. H administered the CAS, which is highly standardized and reliable in determining IQ. (NT at 317)
59. The CAS is often administered when determining reading disorders and disabilities (NT at 250-253.)
60. The CAS F/S IQ test score was 114. (SD-7; NT at 251-52.)
61. The CAS is a test used to determine giftedness when masked by a learning disability (NT at 183.)
62. The CAS "is also more sensitive to learning disabled children, such as dyslexics, than are traditional IQ tests." (SD-7, p. 4 of 15.)

63. Dr. G opined that the CAS IQ score of 114 is probably the best estimate of Student's current intellectual functioning. (NT at 500.)
64. Even using the WISC-IV, which could have had a practice effect, Student did not reach a gifted range of F/S IQ. (NT at 307-08.)
65. Student's second WISC-IV F/S IQ score was actually 5 points lower than the first administration of the same test. (P-10; NT at 184.)
66. There is no reading on the WISC-IV or CAS, therefore, Student's weakness in reading would not negatively impact or mask his IQ scores. (NT at 304.)
67. There was a 9 point difference between the first and second WISC-IV scores in the area of working memory, which Mr. H attributed to practice effect. ((NT at 320-21.)
68. Parent's IEE contains curriculum-based assessments (CBA) and the comprehension scores vary significantly from Student's first two 9-week grading periods. Student's Scholar's English: 88 and 89 – CBA comprehension score: 33%; American Culture: 87 and 91 – CBA comprehension score: 33%; Algebra II Academic (the more rigorous Algebra II class): 95, 96 – CBA comprehension score: 33%; Chemistry 110 (the more rigorous Chemistry class): 95, 94 – CBA comprehension score: 60%. (P-10; SD-9; NT at 113.)
69. Student's Chemistry class is an 11th grade class. (NT at 113.)
70. The S/L evaluation report found Student "possesses above average general receptive and expressive language abilities." He has "a relative weakness in his phonological memory skills in comparison to his other language abilities." (P-7; SD-7.)
71. The S/L pathologist tested Student's general expressive and receptive language scales and they were well above the average range. (NT at 358.)
72. Dr. U did not administer the Comprehensive Test for Phonological Processing (CTOPP) included in his IEE, but used the 3/15/04 test administered by Johns Hopkins University. (NT at 440; P-10.)
73. The S/L pathologist testified that neither the 3/15/04 nor 11/2/06 CTOPP scores indicate a disorder. The test manual clearly indicates the scores are based on a mean of 100 with a standard deviation of 15 with scores between 85-115 within the average range. There were no scores below 85 on either CTOPP and could not be used to conclude Student had any kind of disorder. (NT at 360, 377-378; P-7, P-10, SD-7.)
74. The 3/15/04 CTOPP Standard scores ranged from a low of 88 to a high of 112 and the 11/2/06 CTOPP Standard scores ranged from a low of 88 to a high of 109. (P-10; SD-7.)
75. Student had some current CTOPP scores which were lower than the testing 3 years ago because he is required to get more numbers right in each subtest due to his age. (NT at 371-72.)
76. Dr. U testified that the difference in scores between the 3/15/04 CTOPP and the 12/10/06 CTOPP were not statistically significant. (NT at 473.)
77. The S/L pathologist testified that the CTOPP only diagnoses a weakness or disorder in phonological processing abilities and nothing else, so it is not to be used for auditory processing or auditory processing speeds. (NT at 359.)

78. The S/L pathologist testified that brain-based research shows only 30% of learners are auditory learners. (NT at 362.)
79. The S/L pathologist found Student did not require any special education or specially designed instruction (SDI). (NT at 362.)
80. The S/L pathologist could not understand how Dr. U reached a conclusion that Student had an auditory processing deficit in phonological awareness when the testing did not support that conclusion. (NT at 363, 376-77.)
81. The S/L pathologist testified that an auditory processing deficit can only be diagnosed by an audiologist and she did not see any evaluation conducted by an audiologist in the Center IEE. (NT at 363.)
82. No S/L pathologist worked on the Center IEE (NT at 443.)
83. The Center's IEE reported a WISC-IV F/S IQ score was 128; the District's RR reported a WISC-IV F/S IQ score of 123 and a CAS F/S IQ score of 114. (P-10; SD-9.)
84. The Center's IEE reported a WISC-IV General Ability Index (GAI) score of 142. (P-10.)
85. The GAI score does not include the Working Memory or Processing Speed subtests which are included in the F/S IQ. (P-10.)
86. Dr. U of Center prefers to use the GAI score because WISC published a document "suggesting that it is a more accurate view of a child's true intellectual functioning than they have a learning disability." (NT at 412, 427.)
87. The GAI score is not a widely used index score and wasn't included in the original WISC-IV technical manual. (NT at 246-47, 250-288-89.)
88. Mr. H has never used the GAI (NT at 250, 309.)
89. Dr. U testified he is asked by one local school district to conduct IEEs for giftedness using only the GAI score. (NT at 427-29.)
90. Dr. G testified that the WISC-IV Technical Report No. 4 does not recommend using the GAI to identify children as gifted. (NT at 498.)
91. Dr. G opines that the best estimate of intelligence is a F/S IQ score, not a GAI, and that the GAI is an inappropriate measure to use to identify a student as gifted. (NT at 520-21.)
92. Mr. H found Student to be "a high average ability student" and has an IQ "somewhere between the high average to superior range." (NT at 254, 263.)
93. Dr. U opined that a practice effect could result in either higher or lower scores and called the lower scores a "negative effect." (NT at 211-12.)
94. Mr. H has never seen any research-based discussion of "negative" practice effect. (NT at 257.)
95. Mr. H opined that a practice effect is less likely where a child has a weakness as opposed to a child who has average ability. (NT at 262-63.)
96. In addition to comparing IQ to achievement tests – such as the Woodcock-Johnson (WJ), Wechsler Individual Achievement Test (WIAT), Gray Oral Reading Test (GORT) – comparisons to actual school performance, grades, etc., are also used. (NT at 258.)
97. Both Dr. U and Mr. H administered Form A of the GORT. (NT at 261-62, 278, 400.)

98. Both Dr. U and Mr. H administered Form A of the WJ-III, but Dr. U administered the calculation (Standard score: 118), spelling (Standard score: 107), writing fluency (Standard score: 119), applied problems (Standard score: 107), oral comprehension (Standard score: 111) and editing (Standard score: 107) subtests; Mr. H administered broad reading (Standard score: 107), basic reading skills (Standard score: 97), word identification (Standard score: 97), reading fluency (Standard score: 113), word attack (Standard score 97), passage comprehension (Standard score: 99) and writing samples (Standard score: 100) as subtests. – Standard scores have an average of 100, with scores between 90 and 19 falling within the average range. (P-10; SD-7)
99. Student had no subtest scores lower than average and had 4 scores in the above average range for the WJ-III. (Id.)
100. A standard deviation is calculated between a F/S IQ score and achievement scores, not a GAI IQ score and achievement scores. (NT at 310.)
101. In the District’s psychoevaluation the word “significant” meant 1-1/2 standard deviations. (NT at 268-272.)
102. Mr. H has training in the diagnosis of dyslexia. (NT at 311.)
103. Mr. H testified he went through the model for dyslexia evaluation, which Dr. U did not, and therefore Mr. H could not account for how Dr. U reached the conclusion that Student was dyslexic. (NT at 308.)
104. Mr. H spoke with one of Student’s regular classroom teachers as part of his psychoevaluation. (NT at 310.)
105. In looking at test scores, “standard scores” are the most accurate and “grade equivalent” is the least reliable “because as you go through the testing manual or the scoring, one or two words can jump that 2 grade levels....[and] over the last few years, psychologists have almost dropped the grade equivalent.” (NT at 322-24.)
106. In order for older students to maintain the same test scores they had as very young students, they have to both know and be able to do more. (NT 209, 425, 458.)
107. There is more room for error in IQ at younger ages and IQ scores tend to stabilize around 14. (NT at 275-76, 296.)
108. Dr. U opined that IQ fluctuations are an indication of a learning disability. (NT at 425.)
109. Mr. H testified that in his professional opinion, Student is not dyslexic and does not need or qualify for special education. (NT at 273, 318-19.)
110. Dr. U testified that in his professional opinion, Student is in need of learning support and Student is gifted and absent an insult to the brain, one doesn’t lose giftedness. (P-10; NT at 430, 437.)
111. Dr. U is not a reading specialist. (NT a 442.)
112. Dr. U never observed Student in a classroom although he reviewed Student’s school work as provided by Parent. (NT at 444.)
113. Dr. U testified that school grades are not the indicia that a student has no learning disability (LD) because the student could be taking steps to compensate, such as sitting up front, asking lots of questions, staying after school for additional help, spending far more time doing homework, etc. (NT at 465.)
114. Dr. U never spoke with any of Student’s classroom teachers. (NT at 469.)

115. In Dr. U's professional opinion, Student has a LD that could mask his giftedness. (NT at 474.)
116. Dr. U testified that if a student tested in the gifted range at an early age but didn't read to increase his vocabulary, that would negatively affect his later IQ scores. (NT at 475.)
117. Dr. G testified that the District uses the 'severe discrepancy' model to identify specific learning disabilities. (NT at 495.)
118. Dr. G testified that Student is not a child with a disability as defined by the IDEA, that there is no severe discrepancy, and even though Student has some areas of relative weakness those areas are within the normal range, and Student has no need for SDI. (NT at 508.)
119. Dr. G does not believe Student is either gifted or LD. (NT at 520.)
120. Student has received tutoring at school 4 hours/week which helped him, but tutoring does not identify a student as in need of special education. (NT at 517-18, 531.)
121. Student received 100 hours of tutoring at [redacted] Learning Center; had 1-on-1 tutoring 4 hours/week for most of the 2005-06 school year at school; and currently receives tutoring in the PACE program. (NT at 570.)
122. Parent sees Student struggle with reading and testified he does not read for pleasure. (NT at 568.)
123. Student plays 5 musical instruments: b flat clarinet, bass clarinet, trumpet, bass guitar and acoustic guitar. (NT at 574.)
124. Student takes a leadership role in his church and when he went to Guatemala, he was the "go to" guy for language questions. (NT at 567-68.)
125. Although Student plays football, he has given up marching band and some church activities because they took too much of his time. (NT at 572-73.)
126. The Hearing Officer's 9/24/06 Decision, F/F No. 58, found the gifted coordinator had testified during that due process hearing that Student's work product did not show he was gifted. (P-1 at p. 6.)
127. The Hearing Officer's 9/24/06 Decision, F/F No. 75, found the mathematics teacher had testified during that due process hearing that Student was neither learning disabled nor gifted, but was an advanced student. (P-1 at p.6.)
128. The Hearing Officer's 9/24/06 Decision, F/F No. 76, found the mathematics teacher had testified during that due process hearing that she was one of the people who had requested that Student be reevaluated. (P-1 at p.7.)
129. The Hearing Officer's 9/24/06 Decision, F/F No. 77, found the mathematics teacher had testified that during that due process hearing that she had provided Student with enrichment for the 2005-06 school year but that he did not complete it. (P-1 at p.7.)
130. Student had a standardized score of 120 on the TOWRE, which put him in the 91st percentile. (P-10; NT at 416.)
131. Dr. U administered the Nelson-Denny Reading Test which is a standardized test which is timed, but he testified he found it usually "more useful just to see how long they can go." (NT at 413.)
132. Student's standardized scores on the Nelson-Denny were all within the average range. (P-10.)

133. Student's Woodcock-Johnson III standard scores were all within the average range. (P-10.)
134. Student's GORT-4 standards scores were all within average range. (P-10.)
135. Student's TOWRE standardized scores were all within average range. (P-10.)
136. Student's Rapid Automatized Naming and Rapid Alternating Stimulus Tests (RAN-RAS) standardized scores were all within average or above average range (P-10.)
137. Student's Test of Written Language (TOWL-3) had a standardized score of 120 which was an above average score. (P-10.)
138. Student's Executive Functioning and NeuroCognitive Aptitude Battery (average score = 100) standardized scores were average except for auditory working memory, which was 140 and auditory memory which was 81. (P-10.)
139. Dr. U administered a 52 question Grammar Test from the PSAT for 10th graders and Student answered only 29 out of 52 questions correctly. (P-10.)
140. Dr. U looked not only at the errors but the type of errors Student made and looked for patterns to see if there was a learning disability. (NT at 408-09.)
141. Dr. U testified that the RAN-RAS results gave another indication of a language learning disability. (P-10; NT at 414-15.)
142. The Integrated Visual and Auditory Performance Test (IVA) is given by computer and Student would click the mouse if he either saw or heard the number "1". This test is standardized with a mean of 100, standard deviation of 15. This test showed Dr. U that student has an integration issue. (P-10; NT at 421-22.)
143. Dr. U testified that children with integration issues have trouble with reading and spelling. (Id.)
144. Dr. U explained that the disparity between the WISC-IV vocabulary and the Nelson-Denny vocabulary scores is that the WISC was all verbal and the Nelson-Denny was a reading vocabulary. (NT at 423.)
145. Dr. U never spoke with any of Student's classroom teachers. (NT at 469.)
146. Dr. U's professional opinion is that Student has a LD that could mask his giftedness. (NT at 474.)
147. Dr. U has been a certified school psychologist for 7 years and has administered an average of 2 IEE's per month but has been involved with conducting evaluations since the mid-1980s and has administered at least 2,000. He has taught college courses on how to conduct evaluations. (NT at 202, 430-31.)
148. Dr. L teaches intelligence testing at [redacted] University and works with IQ tests continually, she has over 20 years experience as the District's senior school psychologist. (NT at 82, 103.)
149. Mr. H testified that on the Bender Visual Motor Gestalt test, Student's performance was commensurate with children his age. (NT at 260-61; SD-7.)
150. Mr. H testified that on the GORT which he administered, Student was within the average range. (NT at 261-62; SD-7;
151. Mr. H opined that Student has a weakness in reading but is not dyslexic, and students with such reading weaknesses can succeed in regular education without special education. (NT at 263-273.)
152. Student has not had a F/S IQ score of 130 or higher since 2000. (P-10; SD-7; NT at 102-09.)

153. IQ scores do not stabilize until approximately age 14; young children develop at different rates and some can be far more advanced than their peers at an early age but when they reach the end of the growth and development period IQ scores become more stable. (NT at 103-05.)
154. Student's current IEP provides for an itinerant level of learning support, which is limited to "push-in" twice weekly in Student's English class. (SD-14.)
155. Student's 2005 PSSA scores were 1607 in Reading (scores above 1473 indicate Advanced performance) and 1644 in Mathematics (scores above 1446 indicate Advanced performance). (SD-10.)

Witness Credibility

Parent – Parent presented herself as a very concerned mother who sees her son as gifted but learning disabled in reading. She is highly capable and asked pertinent questions of all the witnesses. She presents herself well. However, her efforts to maneuver the testing process through such things as agreeing to an independent psychologist she did not think was available – and telling him he may not get paid by the District for his work, as well as repeated efforts to change her choice of psychologists and obtaining an IEE before the District was able to even start the evaluation process, lessened her credibility significantly.

Dr. L - The Acting Pupil Services Director for the District. Dr. L has over 20 years of experience, has a Master's degree and her Doctorate in counseling psychology. She is a certified school psychologist and a licensed clinical psychologist and is an adjunct professor at [redacted] University in the Psychology Department. She presented herself as a highly qualified, experienced and credible professional. She was very forthright and her answers were stated without hesitation. She is very knowledgeable and she was a very highly credible witness.

Dr. G - The District's expert has a Ph.D. from University of [redacted] and 42 years' experience in public education. He has taught K-12 and was an administrator for 30 years with the [redacted] IU. He has been a licensed clinical psychologist for 25 years and a certified school psychologist for 36 years; and has his Letter of Eligibility to be a school superintendent. Dr. G presented himself in a professional manner; he weighed the questions carefully; his answers were even-handed, his testimony was very knowledgeable. This witness was highly credible.

Mr. H – The contracted certified school psychologist who performed the psycho-evaluation for the District. Mr. H has 2 Master's degrees, one in reading instruction, and he has completed all but his dissertation (ABD) for his Doctorate degree. He is certified as a teacher (K – 12), as a reading specialist, and as a school psychologist. He has conducted some 5,000 – 7,000 evaluations thus far in his career. Mr. H presented himself as a very capable and knowledgeable professional. His answers were well reasoned and even-handed; he obviously had no bias toward or against the District or Student. His explanations were clear and understandable and he testified persuasively. Dr. G testified

that his work product was, in Dr. G's past experience, always ethical and exact, and it appeared to this Hearing Officer that that remains true. This witness was very credible.

Ms. M – Tenth grade English teacher and curriculum coordinator; certified to teach both English and French, and has 18 years' experience teaching. Ms. M was very professional, answered questions fully, carefully, and knowledgeably. Answers were well-reasoned and without bias. Her concern for Student was apparent. This witness was very credible.

Ms. S – Speech and Language Pathologist employed by the Allegheny Intermediate Unit. Ms. S has a Master's degree in speech/language pathology, has a supervision of special education certificate, has an Instruction 2 teacher certification, a PA speech/language certification, a Certificate of Clinical Competence from the American Speech, Language and Hearing Association, and is currently working on obtaining her reading specialist certification. This witness's testimony, while brief, was very informative. She presented herself professionally and without hesitation. Her answers were well reasoned and articulate. She was very knowledgeable and her answers were unbiased. Her explanation of her testing and the prior CTOPP test was very insightful and helpful. She was highly credible.

Mr. Z – Learning Support English teacher for 10th, 11th, and 12th grades. He is a certified special education teacher with over 30 years of teaching experience and has taught high school English for the past 11 years. While Mr. Z's testimony was quite brief, it was very helpful. He presented himself in a relaxed, professional manner. He spoke clearly and without hesitation. He is highly experienced and spoke credibly about Student and his interaction with him. He presented himself as an unbiased teacher who spoke honestly and without bias. He was highly credible.

Dr. U – Independent school psychologist and counselor. Dr. U has Master's in counseling from [university redacted], and a Doctorate in counseling from the same institution; he has post-doctoral work in school psychologist from the University of [redacted]. He has been a certified teacher and certified school counselor. He is a certified school psychologist, licensed professional counselor, licensed marriage and family therapist, an American Assoc. of Marriage and Family Therapy clinical member, and a national certified counselor. He has over 20 years' experience and has conducted over 2,000 evaluations. Dr. U presented himself in a professional manner, although uncomfortable in testifying, and was very thoughtful with his answers. He explained how he arrived at his scores and the basis for his opinions in an open and forthright manner. He presented himself as a very caring and concerned professional who seeks to understand the underlying causes of Student's difficulties in school and that that could explain and affect some scoring results. Also, he is not an audiologist, and his use of the 3-year old CTOPP test provided by Johns Hopkins conflicted with the explanation given by Ms. S, who is a Speech and Language Pathologist. With those exceptions, Dr. U was a credible witness.

Discussion and Conclusions of Law

Jurisdiction

A due process hearing is a hearing authorized through special education laws of both federal and state legislation. The jurisdiction of such a hearing is highly circumscribed. A hearing officer cannot decide any issue – no matter how significant – which is outside those narrowly defined parameters. Thus, any concerns parents may have regarding education services which concern matters beyond those parameters are beyond the purview of this process and this Hearing Officer.

Witness Credibility

Within the context of the special education arena, “Hearing officers are empowered to judge the credibility of witnesses, weigh evidence and, accordingly, render a decision wherein the hearing officer has included ‘findings of fact, discussion and conclusions of law. . . [and] the decision shall be based solely upon the substantial evidence presented at the hearing.’”² Quite often, testimony – or documentary evidence – conflicts; this is to be expected for, had the parties been in full accord, there would have been no need for a hearing. Thus, as stated, part of the responsibility of the Hearing Officer is to assign weight to the testimony and documentary evidence of facts which concern a child’s special education experience.

Hearing Officers have the plenary responsibility to make “express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses” and

² Spec. Educ. Op. No. 1528 (11/1/04), quoting 22 PA Code, Sec. 14.162(f). See also, Carlisle Area School District v. Scott P., 62 F.3d 520, 524 (3rd Cir. 1995), cert. denied, 517 U.S. 1135 (1996).

“give some reason for discounting”³ or crediting evidence. Further, Hearing Officers’ decisions are to “specifically mak[e] credibility determinations among the various witnesses and contrary expert opinions”.⁴ The Third Circuit, in Shore Regional High School Bd. Of Educ. v. P.S., 381 F.3d 194 (3d Cir. 2004), held that “if a state administrative agency has heard live testimony and has found the testimony of one witness to be more worthy of belief than the contradictory testimony of another witness, that determination is due special weight. *Id.*”⁵ Carlisle Area School v. Scott P., 62 F.3d 520, 527-29 (3d Cir. 1995). Specifically, this means that a District Court must accept the state agency’s credibility determinations ‘unless the non-testimonial, extrinsic evidence in the record would *justify* a contrary conclusion.’ Carlisle, 62 F.3d at 592 (emphasis added). In this context the word ‘justify’ demands essentially the same standard of review by a federal appellate court. See Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 574 (1985).”⁶ This court further held that “the task of evaluating [witnesses’] conflicting opinions lay in the first instance with the ALJ in whose presence they testified.”⁷

Similarly, credibility has been addressed in various jurisdictions. Looking to California, Stevens v. Parke Davis & Co., 9 Cal.3d 51, 67-68 (1973) held that a trier of fact may “accept part of the testimony of a witness and reject another part even though the latter contradicts the part accepted....[and also] reject part of the testimony of a witness, though not directly contradicted, and combine the accepted portions with bits of testimony or inferences from the testimony of other witnesses thus weaving a cloth of

³ Blount v. Lancaster-Lebanon Intermediate Unit, 2003 LEXIS 21639 at *28 (2003).

⁴ *Id.* at *34.

⁵ Citing S.H. v. State-Operated School Dist. of City of Newark, 336 F.3d 260, 271 (3d Cir. 2003)

⁶ Shore Regional at 199.

⁷ *Id.* at 201.

truth out of selected material.” Further, a fact finder may reject the testimony of even an expert witness, although not contradicted. Foreman & Clark Corp. v. Fallon, 3 Cal.3d 875, 890 (1971) California courts have also found that “one credible witness may constitute substantial evidence”. Kearl v. Bd. Of Medical Quality Assurance, 189 Cal.App.3d 1040, 1052. (1986).

Burden of Proof

The burden of proof consists of both the burden of production and the burden of persuasion. Neither the IDEA nor the IDEIA⁸ addressed the subject of burden of proof and therefore the question of which party bore the burden was handled on a state-by-state basis with only a handful of states passing any laws or regulations on the matter. In Pennsylvania, the burden in an administrative hearing challenging an Individualized Education Program (“IEP”) generally fell to the LEA. Recently, however, the United States Supreme Court addressed this issue in Schaffer v. Weast, 126 S. Ct. 528 (2005). In the concluding paragraph of the Opinion of the Court, Justice O’Connor held: “The burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief.”⁹ In Antoine M. v. Chester Upland School District, Civ. Action No 05-3384, (E.D.Pa. Mar. 14, 2006), the Court held that even where the challenge is not to the sufficiency or appropriateness of an IEP, but rather for the failure to find a child eligible for one, “the overarching logic of Schaffer – that, in the context of the IDEA, the party bringing the challenge bears the burden of proof...[and] [a] student’s challenge to a district’s determination that he or she is not eligible for an IEP should not be treated any differently than a challenge to the adequacy of an IEP.” Thus, where a “case is brought

⁸ The IDEIA is variously referred to in case law as the IDEIA or IDEA 2004. In either event, it is one and the same.

⁹ 126 S.Ct. at 537.

solely under the IDEA and arises in a state lacking a statutory or regulatory provision purporting to define the burden of proof in administrative hearings assessing IEPs, *Schaffer* controls.”¹⁰

The burden of persuasion in an administrative proceeding lies with the party seeking relief.¹¹ This requires the Hearing Officer to make a determination of whether or not the evidence is “equipoise” rather than preponderant. Preponderance of the evidence is defined as evidence presented by one party that is of greater weight or more convincing than the evidence offered by the other party. In other words, where there is evidence which tips the scales, the party which presented that evidence prevails. However, where the Hearing Officer finds the evidence is equally balanced on an issue, the non-moving party prevails.

After a close examination and analysis of all of the evidence and the testimony, this Hearing Officer did not find “equipoise”. Thus, the burden of persuasion was not at issue in this case.

Issues

1. Is Parent entitled to an IEE at public expense?
2. Should there be sanctions against the District and training ordered for the District employees?
3. Is a failure to implement a previous due process hearing Order properly before a Hearing Officer or should it be brought before the Division of Compliance?
4. Should Student’s IEP address his dual exceptionality and be based upon the IEE obtained by Parent?

¹⁰ *L.E. v Ramsey Bd. Of Educ.*, 435 F.3d 384, 391 (3d Cir. 2006).

¹¹ *Greenwood v. Wissahickon Sch. Dist.*, Civ. Action No. 04-3880 (E.D. Pa. Feb. 3, 2006) (“Hence, because there is no Pennsylvania law imposing the burden on the district, *Schaffer* applies and the burden of persuasion at the administrative level in Pennsylvania is now on the party contesting the IEP”.)

5. Is the District's Re-evaluation Report sufficient under the IDEA and are the conclusions of the MDE team supported by the evidence that Student is no longer eligible for special education under the IDEA, Chapter 14 or Chapter 16?

Discussion and Conclusions of Law

Issue No. 1: Is Parent entitled to an IEE at public expense?

The IDEA and its implementing regulations set forth the parameters whereby a Parent may be reimbursed for the cost of an IEE. Specifically, Section 300.502, entitled "Independent educational evaluation" provides, in pertinent part:

- (b) Parent right to evaluation at public expense.
 - (1) **A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency**, subject to the conditions in paragraphs (b)(2) through (4) of this section.
 - (2) If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either –
 - (i) File a due process complaint to request a hearing to show that its evaluation is appropriate; or
 - (ii) Ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing pursuant to 300.507 through 300.513 that the evaluation obtained by the parent did not meet agency criteria.
 - (3) If the public agency files a due process complaint notice to request a hearing and the final decision is that the agency's evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at public expense.
 - (4) If a parent requests an independent educational evaluation, the public agency may ask for the parent's reason why he or she objects to the public evaluation. However, the public agency may not require the parent to provide an explanation and may not unreasonably delay either providing the independent educational evaluation at public expense or filing a due process complaint to request a due process hearing to defend the public evaluation.

(5) **A parent is entitled to only one independent educational evaluation at public expense each time the public agency conducts an evaluation with which the parent disagrees.** (Emphasis added through bolding.)

Parent disagrees with the District's RR, proffers an IEE she obtained through the Center, and requests reimbursement for same. The difficulty arises in Section 300.502(b)(1), which requires Parent to disagree "with the evaluation obtained by the public agency." Upon learning that this Hearing Officer had ordered a reevaluation, and, further, required the District to provide a list of certified school psychologists to Parent from which to choose, Parent immediately took steps to obtain her own IEE. In fact, Dr. U completed his testing before she even notified the District which independent certified school psychologist she had chosen to perform the independent psycho-educational evaluation. Parent's initiation of an IEE while the District awaited her choice of psychologist, looks very much like bad faith on her part in that not only did she not wait until after the District's testing was completed but the nature and timing of the testing was such that it made the District's work much more difficult. Added to that, Parent did not share the IEE with the District until the five-day notices were required.

Parent cannot obtain an IEE before she has had the opportunity to read the District's evaluation and make a claim for reimbursement. The IDEA implementing regulations clearly require parent **must disagree** with an evaluation obtained by the District. This means the District's evaluation must be completed **before** Parent seeks her own IEE. Parent's stratagem does not qualify for reimbursement. This request is denied.

Issue No. 2: Should there be sanctions against the District and training ordered for the District employees?

Parent presented no testimony or evidence to support her request that this Hearing Officer impose sanctions and order training for the District employees. Hearing Officers are without jurisdiction to impose sanctions and without any evidence presented in this hearing as a basis for the need for training other than the IEP which argues against Parent's allegation for such a need.¹² This request is denied.

Issue No. 3: Is a failure to implement a previous due process hearing Order properly before a Hearing Officer or should it be brought before the Division of Compliance?

Parent raised her concern that this Hearing Officer's 9/24/2006 Decision had not been implemented and wished to present that issue during this due process hearing. This Hearing Officer denied Parent the opportunity to do so because the IDEA Regulations, at §300.152(c)(3) requires "[a] complaint alleging a public agency's failure to implement a due process hearing decision must be resolved by the SEA." The Pennsylvania Special Education Dispute Resolution Manual, while not statutory in nature, assists through clarification:

Section 1004. Implementation of the Decision

A. The Pennsylvania Department of Education, Bureau of Special Education, monitors the implementation of Hearing Officer decisions when the Hearing Officer has ordered the LEA to take some form of action.

B. If the parent believes that a Hearing Officer decision has not been fully implemented, that party may file a Complaint with the Bureau of Special Education. A Complaint Packet may be obtained by calling the Special Education ConsultLine at 800-879-2301 (Voice) or 717-657-5848 (TTY/TDD). A due process hearing request should not be filed when the only issue is the alleged failure of the educational agency to implement a hearing officer decision. It is the Bureau of Special Education, and not a hearing officer, who has jurisdiction over this issue.

¹² SD-14 provides for in-service training for all teachers 5-6 times yearly.

C. The Hearing Officer and ODR do not participate in the process of assuring implementation of the decision.

D. Oversight of gifted education is with the Bureau of Curriculum and Academic Services.

In light of the foregoing, Hearing Officers do not have jurisdiction to hear cases regarding implementation of prior Hearing Officer decisions. This issue is dismissed.

Issue No. 4: Should Student's IEP address his dual exceptionality and be based upon the IEE obtained by Parent?

The pertinent implementing regulations found at 34 C.F.R. §§300.303, 300.305, 300.306, 300.308, 300.309, 300.310, 300.311, address evaluations and re-evaluations:

300.303 Reevaluations.

(a) General. A public agency must ensure that a reevaluation of each child with a disability is conducted in accordance with 300.304 through 300.311 –

- (1) If the public agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation; or
- (2) If the child's parent or teacher requests a reevaluation.

300.305 Additional requirements for evaluations and reevaluations.

(a) Review of existing evaluation data. As part of an initial evaluation (if appropriate) and as part of any reevaluation under this part, the IEP Team and other qualified professionals, as appropriate, must –

- (1) Review existing evaluation data on the child, including –
 - (i) Evaluations and information provided by the parents of the child;
 - (ii) **Current classroom-based, local, or State assessments, and classroom-based observations;** and
 - (iii) **Observations by teachers and related services providers;** and
- (2) On the basis of that review, and input from the child's parents, identify what additional data, if any, are needed to determine –
 - (i)(A) Whether the child is a child with a disability, as defined in 300.8, and the educational needs of the child; or
 - (B) **In the case of a reevaluation of a child, whether the child continues to have such a disability, and the educational needs of the child;**
 - (ii) **The present levels of academic achievement and related developmental needs of the child;**

(iii)(A) **Whether the child needs special education and related services; or**

(B) **In the case of a reevaluation of a child, whether the child continues to need special education and related services; and**

(iv) Whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the IEP of the child and to participate, as appropriate, in the general education curriculum.

...
...
...

(e) Evaluations before change in eligibility.

(1) Except as provided in paragraph (e)(2) of this section, a public agency must evaluate a child with a disability in accordance with 300.304 through 300.311 before determining that the child is no longer a child with a disability.

300.306. Determination of Eligibility.

(c) Procedures for determining eligibility and educational need.

(1) In interpreting evaluation data for the purpose of determining if a child is a child with a disability under 300.8, and the educational needs of the child, each public agency must –

(i) Draw upon information from a variety of sources, including aptitude and achievement tests, parent input, and teacher recommendations, as well as information about the child's physical condition, social or cultural background, and adaptive behavior; and

(ii) Ensure that information obtained from all of these sources is documented and carefully considered.

(2) **If a determination is made that a child has a disability and needs special education and related services, an IEP must be developed for the child in accordance with 300.320 through 300.324.**

300.308 Additional group members.

The determination of whether a child suspected of having a specific learning disability is a child with a disability as defined in 300.8, **must be made by the child's parents and a team of qualified professionals**, which must include—

(a)(1) **The child's regular teacher**

(b) **At least one person qualified to conduct individual diagnostic examinations of children, such as a school psychologist, speech-language pathologist, or remedial reading teacher.**

300.309 Determining the existence of a specific learning disability.

(a) The group described in 300.306 **may determine that a child has a specific learning disability**, as defined in 300.8(c)(10), if—

(1) The child does not achieve adequately for the child's age or to meet State-approved grade-level standards in one or more of the following areas, when provided with learning experiences and instruction appropriate for the child's age or State-approved grade-level standards:

- (i) Oral expression.
- (ii) Listening comprehension.
- (iii) Written expression.
- (iv) Basic reading skill.
- (v) Reading fluency skills.
- (vi) Reading comprehension.
- (vii) Mathematics calculation.
- (viii) Mathematics problem solving.

(2)(i) The child does not make sufficient progress to meet age or State-approved grade-level standards in one or more of the areas identified in paragraph (a)(1) of this section when using a process based on the child's response to scientific, research-based intervention; or

- (ii) The child exhibits a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, State-approved grade-level standards, or intellectual development, **that is determined by the group to be relevant to the identification of a specific learning disability, using appropriate assessments, consistent with 300.304 and 300.305;**

300.310 Observation.

(a) The public agency must ensure that the child is observed in the child's learning environment (including the regular classroom setting) to document the child's academic performance and behavior in the areas of difficulty.

(b) The group described in 300.306(a)(1), in determining whether a child has a specific learning disability, must decide to –

- (1) Use information from an observation in routine classroom instruction and monitoring of the child's performance that was done before the child was referred for an evaluation; or
- (2) Have at least one member of the group described in 300.306(a)(1) conduct an observation of the child's academic performance in the regular classroom after the child has been referred for an evaluation and parental consent, consistent with 300.300(a), is obtained.**

300.311 Specific documentation for the eligibility determination.

(a) For a child suspected of having a specific learning disability, the documentation of the determination of eligibility, as required in 300.306(a)(2), must contain a statement of

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- (1) Whether the child has a specific learning disability;
- (2) The basis for making the determination, including an assurance that the determination has been made in accordance with 300.306(c)(1);

(3) The relevant behavior, if any, noted during the observation of the child and the relationship of that behavior to the child's academic functioning;

(4) The educationally relevant medical findings, if any;

(5) **Whether –**

(i) The child does not achieve adequately for the child's age or to meet State-approved grade-level standards consistent with 300.309(a)(1); and

(ii)(A) The child does not make sufficient progress to meet age or state-approved grade-level standards consistent with 300.309(a)(2)(i); or

(B) The child exhibits a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, State-approved grade level standards or intellectual development consistent with 300.309(a)(2)(ii)

...

...

(b) Each group member must certify in writing whether the report reflects the member's conclusion. If it does not reflect the member's conclusion, the group member must submit a separate statement presenting the member's conclusions.

(Emphasis indicated by bolding.)

Parent requests this Hearing Officer to order the IEE she obtained to be the foundation for Student's IEP. Her IEE certainly provides additional information which would be of interest to an IEP team – most particularly the results of the curriculum-based assessments. However, there are elements lacking in her IEE which are essential to comply with the law. There was no regular education teacher as part of the IEE team; there was no classroom observation; the speech/language report was 3 years old; there was no finding regarding whether or not Student was achieving adequately or making sufficient progress for his age or meeting State-approved grade-level standards; it has not been considered by the MDT team for them to certify they are in agreement with the findings in the evaluation. In contrast, the RR provided by the District contains all of the legally mandated elements.

Equally important in this discussion is the fact that Parent did not provide the IEE to the District to permit the District to even consider whether or not it was in agreement

with the findings therein until required to do so through the 5-day Notice before this hearing was scheduled to begin. The implementing regulations require that evaluations provided by parents “must be considered by the public agency, if it meets agency criteria, in any decision made with respect to the provision of FAPE to the child.” 34 C.F.R. §300.502(c)(1). Therefore, the District will comply with this requirement and “consider” the IEE. The nature of “consider” was addressed by the Second Circuit in T.S. v. Bd. Of Educ. of the Town of Ridgefield, 10 F.3d 87, 89 (1993) where they held:

No definition of the term “considered” is offered in either the federal or state regulations. Nor do they require that the [Planning and Placement Team] assign a specific weight to any item of information presented to it for its consideration.... Plain meaning is ordinarily our guide to the meaning of a statutory or regulatory term. [Internal citations omitted.] The plain meaning of the word “consider” is “to reflect on: think about with a degree of care or caution.”...Nothing in this definition suggests that every member of a body must read a document in order for the body collectively to ‘consider’ it....

Other circuits have given a limited reading to the term “considered” in this context. The First Circuit stated ... that the regulatory requirement for an IEE to be “considered” by a public agency does not mandate “that there be substantive discussion” of the IEE. And the Eighth Circuit indicated ... that an IEE had been adequately “considered” when it was read by the public school’s director of special education.

The court concluded by noting that two members of that team read the IEE and the court found “that the consideration given to the IEE was sufficient to satisfy [parent’s] due process rights under the IDEA.” (Id. at 90.)

Parent has the right to present her IEE to the IEP team and have it considered but this Hearing Officer lacks jurisdiction to require the District to supplant its RR with the IEE.

Issue No. 5: Is the District’s Reevaluation Report sufficient under the IDEA and are the conclusions of the MDE team supported by the evidence that Student is no longer eligible for special education under the IDEA, Chapter 14, or Chapter 16?

A. Is the District’s RR sufficient under the IDEA?

Yes. See Issue No. 4 for the discussion of the essential elements of a RR.

B. Does Student qualify as a Gifted Student in need of Specially Designed Instruction?

It is clear that Parent sincerely believes Student is gifted and that a learning disability masks that giftedness to some degree. Certainly, Student is very bright and capable and excelling in school in Scholars classes despite a weakness in reading. The question of whether Student qualifies for gifted support is a legal question, however. One arrives at that answer by looking at the state statute and applying the facts to the law.

Pertinent legal authority is found in 22 PA Code Chapter 16.

Section 16.1. Definitions

GENERAL PROVISIONS

§ 16.1. Definitions.

The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise:

Gifted education—Specially designed instruction to meet the needs of a gifted student that is:

- (i) Conducted in an instructional setting.
- (ii) Provided in an instructional or skill area.
- (iii) Provided at no cost to the parents.
- (iv) Provided under the authority of a school district, directly, by referral or by contract.
- (v) Provided by an agency.

(vi) **Individualized to meet the educational needs** of the student.

(vii) Reasonably calculated to yield meaningful educational benefit and student progress.

(viii) Provided in conformity with a GIEP.

Gifted Multidisciplinary Evaluation—**A systematic process of testing, assessment, and other evaluative processes used by a team to develop a recommendation about whether or not a student is gifted or needs gifted education.**

Gifted student—**A student who is exceptional** under section 1371 of the School Code (24 P. S. § 13-1371) **because the student meets the definition of “mentally gifted” in this section, and needs specially designed instruction** beyond that required in Chapter 4 (relating to academic standards and assessment). This term applies only to students who are of “school age” as defined under § 11.12 (relating to school age).

Mentally gifted—**Outstanding intellectual and creative ability the development of which requires specially designed programs or support services, or both, not ordinarily provided in the regular education program.**

Screening and evaluation process—**The systematic determination of whether or not a student is gifted or needs gifted education.**

Specially designed instruction—**Adaptations or modifications to the general curriculum, instruction, instructional environments, methods, materials, or a specialized curriculum for students who are gifted.**

22 Pa. Code §16.21(a) requires school districts to identify students “who are thought to be **gifted and in need of specially designed instruction.**” Section 16.21(d) defines mental giftedness as:

“a person who has an **IQ of 130 or higher** and when multiple criteria as set forth ...indicate gifted ability. Determination of gifted ability will not be based on IQ score alone. A person with an IQ score lower than 130 **may be admitted** to gifted programs when other educational criteria in **the profile of the person strongly indicate gifted ability.** Determination of mentally gifted shall include an assessment by a certified school psychologist.”

Part of the determination of giftedness is looking at the “multiple criteria”, which includes “[a]n observed or measured rate of acquisition/retention of new academic content or skills that reflect gifted ability.” 22 Pa. Code §16.21(e)(2).

§ 16.41. General.

(a) The GIEP team shall **base educational placement decisions** on the gifted student's needs.

(b) Districts may use administrative and instructional strategies and techniques in the provision of gifted education for gifted students which do not require, but which may include, categorical grouping of students. The placement shall:

(1) Enable the provision of **appropriate specially designed instruction based on the student's need and ability.**

(2) **Ensure that the student is able to benefit meaningfully from the rate, level and manner of instruction.**

(3) Provide opportunities to participate in **acceleration or enrichment, or both**, as appropriate for the student's needs. **These opportunities shall go beyond the program that the student would receive as part of a general education.**

(Emphasis added through bolding.)

Pursuant to this Hearing Officer's 9/24/06 Order that an independent certified school psychologist conduct a complete psycho-educational evaluation, the District presented Parent with a list of certified school psychologists from which Parent chose Mr. H.¹³ Mr. H, who is highly trained and knowledgeable, is a certified school psychologist who has conducted over 5,000 evaluations, has 2 Masters' degrees, and is certified both as a teacher and a reading specialist. He testified clearly and convincingly how he conducted the evaluation and how he arrived at the conclusion that Student was neither gifted nor learning disabled. His credibility was further enhanced by Dr. G's testimony that he had worked with Mr. H for several years and found his testing methodologies to be exact. As part of that evaluation, Mr. H conducted the CAS – an intellectual measure

¹³ After speaking with Mr. H and ascertaining he was unavailable, Parent initially emailed the District on Monday, 10/16/06 her choice of Mr. H as psychologist; subsequently, Parent double-checked with Dr. L to ensure her email had been received, after waiting a week and learning Mr. H had agreed to the evaluation, Parent emailed Dr. L of her change of mind, stating she wanted another psychologist. After learning the District would not accommodate her request, Parent emailed yet a third choice of psychologist from the list. Parent claims that her initial choice was a "typo," but her initial concern that Dr. L received her email – in addition to the several-day delay in correcting the purported mistake – belies that testimony.

particularly useful where reading disabilities are suspected. The CAS rendered a F/S IQ score of 114. Because Parent's IEE, conducted the previous month, included the WISC-IV, Mr. H readministered this test solely for comparative purposes due to the practice effect possible if given within a six-month period. Student's second WISC-IV F/S IQ score was actually scored 5 points lower than the first. While Dr. U posited that this could possibly be a result of a "negative" practice effect, this is not a scientifically research-based conclusion and, even more to the point, the CAS score of 114 – upon which Mr. H based his professional opinion that Student did not qualify as a gifted student – was even lower. Additionally, Dr. U reported in his IEE that Student's WISC-IV F/S IQ was 128, which falls short of the IQ of 130 or higher required by the Pennsylvania State statute. Thus, regardless of which of the intelligence test scores one chooses to accept, the outcome remains the same: The District's evaluation makes clear that Student possesses an above average to superior intellectual ability but Student does not meet the minimum IQ required for inclusion in the gifted program. In the prior due process hearing, the Mathematics teacher and the Gifted Coordinator both testified that, in their professional opinions, Student was not gifted. In this hearing, the Scholars English teacher also testified that, in her professional opinion, Student was not gifted. Parent did not offer any testimony by any of Student's teachers who presented a countervailing professional opinion.

Parent argues that due to Student's identification as a student with a learning disability that the District should use the WISC-IV GAI score. However, there is nothing in Pennsylvania's statutes which provides for a finding of giftedness based upon the General Ability Index. While school districts are not prohibited from using GAI scores

and Dr. U testified that, in his experience, there are school districts which choose to use the GAI score, it is not incumbent upon this District to adopt the gifted screening and evaluation procedures of other school districts. Therefore, even if the District were to substitute the Parent's IEE¹⁴ F/S IQ score for that of its CAS F/S IQ score, Student would still not meet the minimum statutory criteria.

However, even if Student qualified on the basis of IQ or through the District's Gifted Screening and Evaluation Procedures which provide that a "student with an IQ score that falls **from 126 to 129**, may be admitted to gifted programs when other educational criteria in the profile of the person strongly indicated gifted ability,"¹⁵ the second prong of special education identification would apply: need for specially designed education or supportive services. Even if this Hearing Officer accepts, *arguendo*, Parent's argument that Student continues to be identified as a gifted student, the evidence is preponderant that specially designed instruction is not needed for Student to have meaningful educational benefit and make progress in his classes. Student exhibits mastery of his classwork in advanced classes such as Scholars English, an advanced Chemistry class, an advanced Algebra II class, and Spanish II without specially designed instruction to further challenge his intellectual abilities.

It does not follow that, had his IQ scores indicate giftedness that he would be in need of specially designed instruction. There must be a showing that a gifted student's needs cannot be met in the regular education classroom using the district curriculum.

¹⁴ As noted *infra*, Parent received the IEE the end of January 2007 but failed to provide it to the District until the 5-day Notices were required to be exchanged. This attempt at "hide the ball" is far from helpful. Additionally, Parent, in what appears to this Hearing Officer to be yet another attempt to cause disarray and confusion to the reevaluation process, submitted her son for this IEE before even advising the District of her choice of an independent psychologist who would conduct the psychological evaluation on the District's behalf.

¹⁵ Emphasis in original document.

Nonetheless, classroom teachers with many years of experience have all testified that Student does not present himself as a gifted student; therefore, it is unreasonable to assume, that even had his IQ scores indicated he were gifted that he would qualify as being in need of specially designed instruction to further challenge him.

Similar facts were presented to the Appeals Panel in Spec. Educ. Op. No. 1777 (Nov. 1, 2006) where the panel held:

Even if we accept, *arguendo*, that Parents' assertions (1) that Student's IQ score meets the eligibility requirements, and (2) that District's gifted screening and evaluation forms and procedures are legally flawed as inconsistent with Pennsylvania's Chapter 16 regulations are correct; it still remains that Student's lack of need for specially designed instruction is fatal to any determination of entitlement, or even need, for gifted services.

The only question which remains is why the District did not question Student's eligibility for gifted support in March of 2004, when they first learned Student obtained a WISC-IV F/S IQ score of 117.

C. Does Student qualify as a Learning Disabled Student in need of specially designed instruction?

Currently, Student has a Learning Support teacher in his Scholars English class twice weekly. This teacher testified that Student does not avail himself of the teacher's expertise beyond asking him occasionally if a word is spelled correctly. Student has a Franklin Speller which he does not utilize. Dr. L testified very credibly that Student is successfully mastering Spanish II and that she has never seen a dyslexic student master a foreign language; rather, dyslexic students struggle with English and seek to find colleges which do not require foreign language. However, Student is receiving high marks in Spanish II without any specially designed instruction or accommodations. He excels in

all of his other classes as his two 9-week reports indicate. Additionally, while two years old, the results of his 8th grade PSSA test scores for Reading and Mathematics – which were achieved without any accommodations – were both in well above the threshold for the highest category of achievement – “Advanced”.¹⁶

The District admits that Student does exhibit a weakness in reading – specifically in working memory and processing speed – however, this weakness clearly does not rise to the level required by federal or state law to require special education services. Mr. H, an independent consultant with no ties to the District, is a certified school psychologist and a reading specialist, and he testified that Student is not dyslexic and does not qualify for special education as a student with a SLD. His testimony was very persuasive. The District has presented convincing evidence and testimony that Student is well-served in the regular education classes.

Thus, after a careful review of the testimony and evidence as well as the pertinent legal authority, this Hearing Officer finds that Student’s grades and standardized test scores fail to show either an SLD or qualification for Giftedness under the IDEA and Chapters 14 and 16.

¹⁶ F/F No. 157. The Court in *J.H. v. Manheim Township School District*, 2005 U.S. Dist. LEXIS 39756 (Nov. 29, 2005) at footnote 6, stated: We take judicial notice that the Pennsylvania System of School Assessment (“PSSA”) is described by the Pennsylvania Department of Education on its website as a standards based criterion-referenced assessment used to measure a student’s attainment of the Commonwealth’s adopted academic standards for reading, writing, speaking and listening and mathematics. The test is also designed to help determine the degree to which school programs enable students to attain proficiency of the standards.”

Summary

Parent offered an impassioned plea for her child to continue identified as both gifted and learning disabled but did not offer persuasive legal authority upon which this Hearing Officer can rely in order to make such a finding. This Hearing Officer lacks the authority to supplant or superimpose the GAI score for a F/S IQ score. In Pennsylvania, for a student to meet the threshold for giftedness, the law requires an IQ of 130. This requirement is not a GAI score, it is a Full Scale score. While school districts may choose to use a GAI score, they are not required to do so and, further, it is not the standard practice to do so. This District chooses to use the F/S IQ, not the GAI. Parent's IEE found Student had an F/S IQ score of 128; thus, even using Parent's IEE, Student does not meet that threshold figure.

Parent may share her IEE with the MDT and IEP teams and the IEP team shall consider the contents thereof. However, the law is quite clear that it is not required to accept the findings therein. Further, Parent's rush to obtain an IEE before even advising the District of a cert. school psychologist from its list was incredibly shortsighted as, whatever her motives might have been, she precluded this Hearing Officer from awarding her the cost of the IEE. Again, the law is quite clear – if Parents are to be reimbursed for an IEE, reimbursement is ordered only when: (1) there is already an ER with which parent disagrees, and (2) the IEE provides information which is not available in the ER. Additionally, Parent added a significant burden to the District's independent psychologist by having virtually all the usual testing measures administered just weeks before the District could arrange its testing. While Parent may not have seen her actions as disruptive to the process of ascertaining what needs her son may or may not have, the

kindest frame of reference would be to state that, unfortunately, her actions did not assist in any way.

It is clear that Parent sees her son as gifted and needing special education to compensate for his reading weakness – and believes that this weakness masks his intelligence to some degree. The District agrees that Student exhibits a weakness in reading, but not to the degree that qualifies him for special education. Student is a bright young man – his grades in advanced classes shows remarkable ability. Further, his 8th grade PSSA results - which were obtained without any accommodations for his reading weakness – substantiate the conclusion that this is a very bright student. But the legal requirements for a finding of giftedness and SLD were not met.

Further, Parent requested sanctions against the District and that this Hearing Officer order training for the District employees. First, Hearing Officers do not have jurisdiction to order sanctions. Second, there was no showing by the Parent of any basis upon which to order training. Therefore that issue was denied. Parent also asked this Hearing Officer to consider a failure to implement a Hearing Officer's Order. This also is beyond a Hearing Officer's jurisdiction and this issue was dismissed.

As Parent requested the hearing she bears the burden of persuasion. Looking at this issue in the light that is most favorable to Parent, at best, there could only be a finding of equipoise. Parent presented an IEE during the hearing which – without the certified school psychologist to explain and defend the findings – would have had little merit because it was not provided to the District so it could be considered as part of the RR. This Hearing Officer then called the certified school psychologist as a Hearing

Officer witness to testify regarding the IEE. While credible, his testimony did not tip the scales in Parent's behalf. Rather, the evidence was more than preponderant -- it was clear and convincing -- that Student, while having somewhat of a weakness in reading, does not exhibit the legal standard requisite for a continued finding that he has a SLD as defined by the IDEA.

It is apparent that both parties want the best for this Student but are at loggerheads on how that is to be effected. It is the sincere hope of this Hearing Officer that this Decision will aid in that process and that the parties will forsake their rebarbative verbal volley and permit Student to finish his school year – and the rest of his high school career – in peace.

ORDER

For the reasons hereinabove discussed, it is hereby ordered:

1. Parent is not entitled to reimbursement of her IEE.
2. Sanctions against and training of District personnel is denied.
3. Parent request to be heard regarding her Complaint of a failure to implement a Hearing Officer's Order is dismissed. It must be brought before the Division of Compliance.
4. Parent's request that her IEE form the basis for an IEP to address dual exceptionalities is denied.
5. The District's RR is sufficient under the IDEA and the conclusions of the MDE team are supported by clear and convincing evidence that Student is no longer eligible for special education under the IDEA, Chapter 14 and Chapter 16.

Margaret Drayden

Hearing Officer