

This is a redacted version of the original decision. Select details have been removed from the decision to preserve the anonymity of the student. The redactions do not affect the substance of the document.

**Pennsylvania Gifted Education Due Process Hearing Officer
Final Decision and Order**

OPEN HEARING

ODR No. 29935-23-24

Child's Name:

R.F.

Date of Birth:

[redacted]

Parents:

[redacted]

Counsel for Parents:

Pro Se

Local Education Agency:

Manheim Central School District
281 White Oak Road
Manheim, PA 17545

Counsel for LEA:

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Hearing Officer:

Joy Waters Fleming, Esq.

Date of Decision:

8/6/24

INFORMATION AND PROCEDURAL HISTORY

The student (hereafter Student)¹ is a rising [redacted]-grade student in the District (District). Parents are *pro se* and requested a due process hearing under Chapter 16 contesting the result of the District's evaluation that did not identify Student as gifted, resulting in ineligibility for gifted education programming.²

The case proceeded to an in-person due process hearing, and the parties presented evidence supporting their respective positions. After reviewing the District's procedures to evaluate this Student for gifted eligibility, the evidence established that the District met all appropriate evaluation requirements and produced an accurate gifted written report (GWR).

For the reasons set forth below, the Parents' claims are denied.

ISSUES³

1. Did the School District incorrectly conclude that Student is not eligible for gifted education, and is the Student eligible for gifted educational services under Chapter 16 ?

¹The Parents elected to have an open hearing. Only the decision shall be available to the public. 22 Pa. Code § 16.63(d)

² 22 Pa. Code §§ 16.1 – 16.65.

³ The *pro se* Parents requested this phrasing of the statement of issues. (N.T. 8-9)

2. If yes, whether the GIEP must recommend math 6+ with accompanying accommodations to facilitate access?

3. Are Parents of Student entitled to restitution from the School District for costs incurred for supplemental math education (Kumon) for skill appropriate services not provided by the District?

FINDINGS OF FACTS

Previous educational history

1. During the 2022-2023 school year, the Student was enrolled in the [redacted] grade in the District. (J-1)
2. On September 14, 2021, the District issued a gifted written report (GWR). The GWR concluded that the Student was not gifted and ineligible for gifted education placement and programming. (J-1)

2023-2024 School Year

3. During the 2023-2024 school year, the Student was enrolled in the [redacted] grade in the District. (J-2)
4. The Student received math acceleration as a general education student. (N.T. 116)
5. This Student was referred for a GMDE to determine whether the Student qualified for gifted programming. (J-2)

6. Before the testing, the Parents requested breaks during testing, expressed concerns about the Student's focus, and provided suggestions to build pre-testing rapport. Parent requested that the psychologist consult with the Student to ascertain the preferred testing time. The Student indicated a forty-minute morning time frame. Six days of standardized testing occurred. (J-2, p. 3; N.T. 22-26)
7. On May 6, 2024, the District issued its Gifted Written Report (GWR) regarding the Student. The GWR included past and current assessment data, Parent and teacher input, cognitive and achievement test results, learning strengths, gifted rating scales, educational needs, acquisition and retention skills assessment, classroom data, and possible intervening factors. (J-2)
8. For inclusion in the GWR, the District's experienced, credentialed school psychologist administered the Wechsler Intelligence Scale for Children, Fifth Edition (WISC-V) to the Student. On the verbal comprehension index, the Student received a scaled score of 106 in the 66th percentile. On the visual-spatial index, the Student received a scaled score of 132 in the 98th percentile. On the fluid reasoning index, the Student received a scaled score of 126 in the 96th percentile. On the working memory index, the Student received a scaled score of 125 in the 95th percentile. On the processing speed index, the Student received a scaled score of 92 in the 30th percentile. (J-2, p.4; N.T. 22-26, 113)
9. The WISC-V is a norm-referenced, standardized assessment of cognitive abilities. Based on the scores received on the WISC-V, the Student's full-scale IQ was determined to be 119 in the 90th

percentile. The Student's general ability index scaled score was 121, in the 92nd percentile. (J-2)

10. The school psychologist administered reading comprehension, math concepts, and applications testing from the Kaufman Test of Educational Achievement-Third Edition (KTEA-3) Brief for inclusion in the GWR. The KTEA-3 is a normed, standardized measure to assess the Student's academic achievement. (J-2, p. 6)
11. On the KTEA-3, the Student received a standard score of 98 in the 45th percentile in reading comprehension. In math concepts, the Student received a standard score of 106 in the 96th percentile. (J-2, p. 6)
12. For inclusion in the GWR, a Parent, the Student's [redacted] grade math and [redacted] grade Art, STEM, library and PE teachers completed the Scales for Identifying Gifted Student, Second Edition (SIGS).⁴ teacher, the (J-2, p. 6)
13. The Student's teachers' standard scores through the SIGS-2 equated to a general intellectual ability of 113 (81st percentile) (somewhat likely probability of giftedness). The Parent's standard score through the SIGS-2 equated to a general intellectual ability of 119 (90th percentile) (somewhat likely probability range of giftedness). (J-2, p, 7)

⁴ The SIGS-2 is rating scale designed to obtain educators' and/parents' estimates of a student's characteristics in some or all of the following areas: general intellectual ability, language arts, mathematics, science, social studies, creativity, and leadership. (J-2, p. 6)

14. The GWR included the Students' acquisition and retention rates. One teacher indicated that the Student acquired new information at a rate slightly higher than a typical [redacted] -grade student. A second teacher indicated the Student required few repetitions to master a skill. (J-2, p. 8)

15. The GWR included consideration of the Student's achievement, performance, and expertise in one or more academic areas as evidenced by the excellence of products, portfolio or research, and criterion-referenced team judgment. (J-2, p. 8)

16. The Parent reported that the Student completed all math work through pre-algebra in Kumon and that benchmark testing from fall 2021 indicated scores in the 98th and 99th percentile. In reading, the Parent reported the Student reads one to two chapter books a week. (J-2, p. 13)

17. The Student's STEM, classroom and math teachers indicated the Student gravitates toward science experiments and excels at math. (J-2, p. 8)

18. For inclusion in the GWR, a Parent and current teachers provided input regarding the Students skills related to higher-level thinking, creativity, leadership, communication, work habits, intense academic interests, foreign language aptitude, and technology expertise. (J-2, p. 14-17)

19. The Parent observed the Student to be curious and have clever responses and alternative solutions. A teacher noted the Student was

cooperative and worked well with peers. The Student's oral communication was stronger than written with needs communicated clearly. The Student's school work habits were noted to be strong, but homework was not always completed. The Student's teachers offered no input regarding intense academic interest, but the Parent noted math concepts and reading. No foreign language aptitude was noted. The classroom teachers did not provide information regarding the Student's technology expertise. The Parent indicated the Student expertise was advanced. (J-2, p. 14-16)

20. The GWR indicated that differentiated instruction met the Student's educational needs relevant to suspected giftedness. No known intervening factors that could mask gifted abilities were noted in the GWR; however, the evaluator indicated that on May 6, a Parent indicated the Student had ADHD. (J-2, p. 16)

21. The evaluating psychologist applied the information from the administered testing and assessments to the District's gifted eligibility matrix (GEM). (J-3; 19, 103)

22. The District's (GEM) calculated possible points for categories of intellectual abilities (FSIQ or GAI), intellectual abilities (fluid reasoning or visual-spatial, verbal reasoning) scores, achievement skills (reading, math), Parent and teacher gifted characteristics (SIGS), state and local assessments (reading, math), and intervening factors (ELL, racial/cultural bias, 504, medical conditions affecting learning). (J-3)

23. Each category offers a point value. To be identified as gifted in the District, the GEM requires a score of 30+. (J-3)

24. On the GEM, the Student received an initial score of 24.5 and an adjusted score of 25.5. The school psychologist added an extra point to the matrix calculation under intervening factors after the Parents indicated the Student had an ADHD diagnosis. (J-2, p. 16, J-3, p. 16; N.T. 46, 154)
25. The GWR considered factors other than the Student's IQ score to determine identification and potential eligibility for gifted education. (J-2)
26. The May 2024 GWR concluded that the Student was not gifted and ineligible for gifted placement and programming. On May 6, the District provided the Parent with a notice of recommended assignment (NORA) reflecting the ineligibility determination and notice of parental rights. (J-2, p. 16, S-2)
27. On July 25, 2024, the Parents filed a due process complaint.

DISCUSSION AND CONCLUSION OF LAW

General Legal Principles

The burden of proof is viewed as consisting of two elements: the burden of production and the burden of persuasion.⁵ The burden of persuasion lies with the party seeking relief. Although Chapter 16 does not speak to the burden of proof in gifted due process proceedings, the burden lies with the party who initiated the request for due process. *E.N. v. M. School District*, 928 A.2d 453, (Pa. Commw. 2007); see also *D.Z. v. Bethlehem Area School District*, 2 A.3d 712 (Pa. Commw. 2010).

⁵ Because the Parents were *pro se*, the District was assigned the burden of production.

Accordingly, the burden of persuasion in this case must rest with the Parent, as the party that requested this due process hearing.

It is the responsibility of the Hearing Officer to make credibility determinations and to assess the weight to be accorded the evidence. *E. N.* at 461. The evaluating school psychologist, the Director of Special Education, and a Parent testified during this hearing. This hearing officer found the witnesses who testified to be credible as to the facts. The weight accorded the evidence, however, was not equally placed. The testimony of the knowledgeable school psychologist was very credible and carried great weight in this determination. She thoroughly explained the assessments performed, the conclusions reached and the rationale that drove the ultimate resolution of this case.

Chapter 16 Principles

Gifted education in Pennsylvania is governed by Pennsylvania law as set forth at 22 Pa. Code §§ 16.1 – 16.65 (Chapter 16). The purpose of Chapter 16 is to provide an education to each identified student that is based upon the unique needs of that student. This education can include acceleration and/or enrichment programs and services that are rendered according to the student's intellectual/academic needs and abilities. Chapter 16 also provides for certain procedural safeguards as well as an obligation on the part of the school district to identify an appropriate program for students who are gifted and need specially designed instruction beyond that which is provided in the regular education program.

Under Chapter 16, a "Gifted Student" is:

- (i) 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).

- (ii) The term applies only to students who are of "school age" as defined under § 11.12 (relating to school age).

"Mentally gifted" is defined as 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. 22 Pa. Code § 16.1 Thus, in order to be eligible for gifted education, a student must first be identified as gifted and, secondly, determined to need specially designed instruction.

The relevant screening and evaluation provisions applicable to identifying gifted students are found in 22 Pa. Code §16.21 (c) and (d). Under Chapter 16, IQ score cannot serve as the sole basis to determine giftedness. Other factors, known as "multiple criteria," can be considered to identify a gifted student with an IQ score of less than 130.

Under 22 Pa. Code, section 16.21(d):

Each school district shall establish procedures to determine whether a student is mentally gifted. This term includes a person with an IQ of 130 or higher or when multiple criteria set forth in this chapter and in Department Guidelines indicate gifted ability. Determination of gifted ability will not be based on IQ score alone. Deficits in memory or processing speed, as indicated by testing, cannot be the sole basis upon which a student is determined to be ineligible for gifted special education. 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 must include an assessment by a certified school psychologist. 22 Pa. Code § 16.21(d) (emphasis added)

In analyzing this language, the Commonwealth Court in *E.N. v. M. School District*, 928 A.2d 453, (Pa. Commw. 2007), concluded:

[T]he language in the regulation describing a person with an IQ of less than 130 utilizes the permissive may be admitted to gifted programs, and not the mandatory shall or a similar mandatory command. We also note that, under this system, a child who displays multiple criteria of giftedness and has an IQ score of 130 or above is to be admitted to the gifted program, whereas it is within the District's discretion to admit a child who displays the same multiple criteria of giftedness but who has an IQ score of less than 130. *E.N.* at 456.

Under 22 PA Code § 16.21(e), multiple criteria indicative of gifted ability includes:

- (1) A year or more above grade achievement level for the normal age group in one or more subjects as measured by Nationally normed and validated achievement tests able to accurately reflect gifted performance. Subject results shall yield academic instruction levels in all academic subject areas.
- (2) An observed or measured rate of acquisition/retention of new academic content or skills that reflect gifted ability.
- (3) Demonstrated achievement, performance or expertise in one or more academic areas as evidenced by excellence of products, portfolio or research, as well as criterion-referenced team judgment.
- (4) Early and measured use of high-level thinking skills, academic creativity, leadership skills, intense academic interest areas, communications skills, foreign language aptitude or technology expertise.
- (5) Documented, observed, validated or assessed evidence that intervening factors such as English as a second language, disabilities defined in 34 CFR 300.8 (relating to child with a disability), gender or race bias, or socio/cultural deprivation are masking gifted abilities.

Chapter 16 provides a precise description of the screening and evaluation process school districts must undertake to ensure that all eligible and thought to be eligible gifted children are identified and provided with

educational benefit. Under Chapter 16, a gifted multidisciplinary evaluation (GMDE) is 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 22 Pa Code § 16.1. The GMDE must be sufficient in scope and depth to investigate information relevant to the student's suspected giftedness, including academic functioning, learning strengths and educational needs. 22 Pa. Code 16.22(e). The process must include parental input. 22 Pa. Code 16.22(f).

The GMDE must be:

1. Selected and administered in a manner that is free from racial and cultural bias and bias based on disability.
2. Selected and administered so that the test results accurately reflect the student's aptitude, achievement level or whatever other factor the test purports to measure.
3. Professionally validated for the specific purpose for which they are used.
4. Administered by certified school psychologists under instructions provided by the producer of the tests and sound professional practice.
5. Selected and administered to assess specific areas of educational need and ability and not merely a single general IQ.

22 Pa. Code § 16.22(3)(i)-(v).

Finally, under the Chapter 16 regulations, a gifted written report (GWR) must result from the determination of the GMDE with a recommendation as to whether the Student is gifted, a basis for the recommendation, programming suggestions and the names of members of the gifted multidisciplinary team. The GMDE must be presented to the parents no later than sixty calendar days after receiving consent to perform the evaluation.

Parents' Complaint

The Parents contend that the District's GMDE and subsequent GWR were flawed and reached the inaccurate conclusion that the Student was not gifted. In support of this contention, the Parents alleged that the District's eligibility matrix used to determine the Student's identification as a gifted learner in a (single subject) was inconsistent with Chapter 16. They seek a determination that the Student is gifted, eligible for gifted programming, and reimbursement for tutoring costs. For the following reasons, the Parents have not met their burden of proof.

The first issue to be determined is whether the District's evaluative process was appropriate and compliant with Chapter 16. On this hearing record, the Parents failed to introduce persuasive evidence that the District's GMDE and issued GWR relied solely on the Student's FSIQ to determine that Student was not gifted. To assess the Student's cognitive performance, the school psychologist administered the (WISC-V). The WISC-V is a norm-referenced, standardized assessment of cognitive abilities. Based on the scores received on the WISC-V, the Student's full-scale IQ was determined to be 119 in the 90th percentile. The Student general ability index scaled score was 121, in the 92nd percentile. Based on those scores, the Student's full-scale IQ was determined to be 119, far short of the 130 delineated in Chapter 16 for automatic consideration of gifted eligibility.

Next, because the testing administered to the Student determined an FSIQ of less than 130, my inquiry must now turn to whether the District appropriately considered the Chapter 16 "multiple criteria" indicative of giftedness. This information was used with the District's eligibility matrix, which determined the Student's ineligibility for gifted education. To assess reading and math levels, the District administered components of the KTEA-3. Using age-level norms, the Student demonstrated average reading

comprehension abilities and high and math concepts & applications performance. In addition to consideration of achievement measures, the District reviewed this Student's rate of acquisition/retention of new content in its determination of giftedness. Consistent with the requirements of Chapter 16, the Student's current educators provided input that the Student acquired new information at a rate slightly higher than a typical third-grade student. A second teacher indicated the Student required few repetitions to master a skill.

In applying the Chapter 16 multiple criteria, the District considered the Student's demonstrated achievement, performance or expertise in academic areas as evidenced by the excellence of products, portfolio or research, and criterion-referenced team judgment. This criterion can be satisfied by showing student-created permanent products, portfolios, skills demonstrations, awards and community involvement.⁶ Based on both Parent and educator input, Student is bright, motivated and ambitious. The Parent reported the Student completed math through pre-algebra in Kumon and that benchmark testing from fall 2021 indicated that the scores were in the 98th and 99th percentiles. In reading, the Parent reported that the Student reads one to two chapter books a week. The Student's STEM, classroom and math teachers indicated that the Student gravitates toward science experiments and excels at math. No other evidence of a project, creative product or portfolio created by Student was introduced into the record.

As required by Chapter 16, the District's GWR fully considered Parent and current teachers input regarding the Students skills related to higher-level thinking, creativity, leadership, communication, work habits, intense

⁶ Gifted Education Guidelines, May 2014, Pennsylvania Department of Education

academic interests, foreign language aptitude, and technology expertise. Finally, the GWR did not identify any factors or intervening issues that could mask gifted abilities. Although, after testing, a Parent mentioned the Student had ADHD, they failed to introduce any evidence that this diagnosis affected the proper administration of the evaluation or impacted the final determination.

Next, the Parents contended that the District's gifted eligibility matrix (GEM) was not compliant with the requirements of Chapter 16. The District's GEM calculated points for intellectual abilities, achievement skills, Parent and teacher input regarding gifted characteristics, state and local assessments, and intervening factors. On the GEM, the Student received an initial score of 24.5 and an adjusted score of 25.5. The school psychologist added an extra point to the matrix calculation after the Parents indicated the Student had an ADHD diagnosis. Even with that adjustment, the Student's score still fell short of the 30+ needed for gifted consideration. The Parents appear to allege that under certain hypothetical situations, a child could earn a combination of points, strongly suggestive of giftedness but still would not satisfy the District's eligibility criteria. This evidentiary consideration through the current due process hearing concerns only one child, the Student. Based on the application of the matrix, which incorporated the comprehensive and appropriately performed Chapter 16 compliant evaluation, this Student was not gifted.

Next, the Parents appeared to contend that the District's provision of above-grade-level math programming to the Student was somehow an admission or indication of giftedness. This argument is unpersuasive. The GWR thoroughly outlined this Student's math interest and very strong abilities. However, the District's commitment to this and every Student in the District to meet their needs through differentiation, single subject

acceleration or other educational best practices does not automatically mean that every student receiving this instruction is eligible for gifted programming.

Finally, the Parents raise issues related to the appropriateness of the Student's general education math curriculum and their expenditures for private enrichment services. Under Chapter 16, parents may request a due process hearing to address issues concerning the identification, evaluation or educational placement of, or the provision of gifted education to, a student who is gifted or who is thought to be gifted if the parents disagree with the school district's identification, evaluation or placement of, or the provision of gifted education to the student. 22 Pa. Code. § 16.63. This gifted education hearing officer lacks jurisdiction over general education decisions and practices and declines consideration of those issues, raised by the Parents.⁷

Based on the totality of the evidence, as the party with the burden of proof, the Parents failed to introduce persuasive evidence contradicting the determinations outlined in the GMDE and the resultant GWR. Based on this hearing record presented for determination, the GMDE complied with the requirements of Chapter 16. The District's GMDE and resultant GWR were sufficient in scope and depth. As outlined in the detailed findings, the District's assessments of the Student were administered free from bias, accurately reflected aptitude and achievement levels, professionally validated, and administered by a credentialed school psychologist consistent with sound professional practice and fully compliant with Chapter 16.

These *pro se* Parents impressively and appropriately advocated for their bright, motivated and kind child. However, on this hearing record, they have failed to sustain their burden of proof. The District correctly evaluated

⁷ See, *C.S. v. Downingtown Area Sch. Dist.*, ODR No. 24125-2021KE (11/1/2020); *C.C. v. Solanco School District*, ODR No. 1752-1516KE (2/29/16).

the Student for gifted. The District has satisfied its responsibilities under Chapter 16.

ORDER

AND NOW, this 6th day of August 2024, the following is Ordered:

In accordance with the preceding findings of fact and conclusions of law, it is hereby ORDERED as follows:

1. The District is not required to take any further action.

IT IS FURTHER ORDERED that any claim not specifically addressed in this Decision and Order is DENIED and DISMISSED.

/s/ Joy Waters Fleming

Joy Waters Fleming, Esquire
HEARING OFFICER
RF.29935.2424

8/6/24