

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. 28616-23-24

Child's Name

L.R.

Date of Birth

[redacted]

Parents

[redacted]

Counsel for Parents

Pro Se

Local Education Agency

Haverford Township School District
50 E. Eagle Road
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Hearing Officer

Joy Waters Fleming, Esq.

Date of Decision

11/16/23

INFORMATION AND PROCEDURAL HISTORY

The student (hereafter Student)¹ is a [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

After reviewing the District's procedures to evaluate this Student for gifted eligibility, the evidence established that the District met all requirements for conducting an appropriate evaluation and producing an accurate gifted written report (GWR). The case proceeded to a due process hearing, and the parties presented evidence supporting their respective positions. For the reasons set forth below, the Parents' claims are denied.

ISSUES

- 1) Did the School District properly evaluate Student for gifted education services?
- 2) Did the District use appropriate criteria for determining Student's eligibility, and correctly conclude that Student is not a gifted student ?
- 3) If the District failed to properly evaluate Student or incorrectly concluded that Student is not eligible for a gifted education, what is the appropriate remedy?

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.

FINDINGS OF FACTS

2022-2023 School Year

1. During the 2022-2023 school year, the Student was enrolled in the [redacted] grade in the District. (P-14)
2. On June 2, 2023, the Parents consented to a gifted multidisciplinary evaluation (GMDE) of the Student. That same day, the Parents completed and signed an information form for review by the evaluation team. On the form, the Parents reported the Student had a gifted learner sibling, was independent, asked challenging questions, got mostly 100% in ELA and math, enjoyed puzzles, was artistic and exhibited perseverance with many activities. (S-4, S-6)
3. The District receives referrals for (GMDEs) from teachers and parents through a universal screening of [redacted] graders. After the Otis-Lennon School Ability Test (OLSAT) screener is administered, the highest scores are referred for an evaluation. If a student does not receive a qualifying score on the OLSAT, they are referred for additional screening through the Slosson Intelligence Test (SIT). The District administers a gifted evaluation if a specific cutoff score is met. (N.T. 24-25, 130-131)
4. This Student was referred for a GMDE through the District's universal screening process and performance on the OLSTAT and the secondary screen, the SIT. Of the six students who took the OLSAT, five were identified as gifted. Of the nine students referred for the SIT, two were identified as gifted. (N.T. 24-26)

2023-2024 School Year

5. During the 2023-2024 school year, the Student is enrolled in the [redacted] grade in the District. (S-9)
6. On September 22, 2023, the District issued its Gifted Written Report (GWR) regarding the Student. The GWR summarized the cognitive and achievement testing administered to the Student, a records review and consideration of multiple criteria to assess gifted identification and eligibility. (S-9; N.T. 28)
7. The GWR contained information that included Parent and teacher input, cognitive and achievement test results, an assessment of acquisition and retention skills, classroom data, and possible intervening factors. (S-9, S-16, S-19; N.T. 31-32)
8. For inclusion in the GWR, the Parents completed a gifted eligibility evaluation - rating scale, with all areas as "almost always" and "frequently." The bottom of the form asked what other information about your child would be relevant to know and referenced foreign language and technology experience. The Parents did not supply additional information. (S-6, S-9, S-19)
9. 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 (similarities, vocabulary), the Student received a standard score of 121 in the 92nd percentile (high average). On the visual-spatial index (block design, visual puzzles), the Student received a standard score of 117 in the 87th percentile (above

average). On the fluid reasoning index (matrix reasoning, figure weights), the Student received a standard score of 109 in the 73rd percentile (average). On the working memory index (digit span, picture span), the Student received a standard score of 103 in the 58th percentile (average). On the processing speed index (coding, symbol search), the Student received a standard score of 105 in the 63rd percentile (average). (S-9, p. 3-4, S-16; N.T. 23-24, 52, 97)

10. 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 117 in the 87th percentile (high average). (S-9; N.T. 32-34)
11. The GWR incorporated a comprehensive explanation of the Student's performance on the seven subtests used to derive the index scores. (S-9)
12. For inclusion in the GWR, the certified school psychologist administered reading comprehension and math problem-solving subtests of the Wechsler Individual Achievement Test, Fourth Edition (WIAT-4), a normed, standardized measure to assess the Student's academic achievement. (S-9)
13. On the WIAT (4), in reading comprehension, the Student received a standard score of 124 in the 95th percentile (very high) on a [redacted]-grade passage. In math problem-solving, the Student received a standard score of 114 in the 82nd percentile (high average). The District regarded the standard score as useful for determining the

Student's reading level. (S-9, p. 5, S-16, S-20; N.T. 29, 35-36, 49-50, 78, 95)

14. Although, in reading, the Student performed above grade level as measured by a normed and validated achievement test, the school psychologist indicated reading performance in the District reflective of a gifted learner would be in the 98th percentile. (N.T. 36, 49, 67-68, 81, 108)
15. In a separate WIAT-4 score report, not included in the GWR, the Student's reading comprehension was reported to have a grade equivalent of 8.0. The Student's math problem-solving was reported to have grade equivalency of 4.1. Based on the test publisher's recommendations, the District does not rely on grade level equivalencies as psychometrically sound, valid or reliable for academic placement or diagnostic considerations. (S-9, p. 5, S-16, S-20; N.T. 29, 35-36, 49-50, 69-70)
16. The Student's former [redacted]-grade teacher provided input for the GWR. The teacher reported the Student exhibited 13/20 qualities that demonstrated a high rate of acquisition and 12/12 qualities of a student with high retention.³ In the District, a gifted learner should have an acquisition score of 12/12 and a retention score of 18, 19, or 20 out of 20. (S-9, S-16; N.T. 37-38, 50)
17. For inclusion in the GWR, the Student's former [redacted]-grade teacher completed gifted rating scales (GRS) that scored the Student's higher-level thinking skills, academic creativity and leadership skills.

³ Chuska Scales for Acquisition and Retention

The GRS provides a gifted classification of very high, high, moderate, and low probability. The teacher regarded the Student's higher level thinking skills and academic creativity as "high probability" and leadership skills as "low probability." (S-9, p. 6-7, S-16; N.T. 30-31, 41)

18. Under the intense academic interest category in the GWR, the Student was observed to have a strong interest in math and reading and enjoyed the opportunity to solve problems and work on challenging math activities. The Student had a well-developed vocabulary and actively participated in class. (S-16)
19. The GWR reported no foreign language aptitude. The GWR indicated the Student's technology aptitude was commensurate with [redacted]-grade peers. The GWR did not identify any intervening factors that could mask gifted abilities. (S-9, p. 7, S-16; N.T. 51)
20. The GWR considered factors other than the Student's IQ score to determine identification and potential eligibility for gifted education. The GMDE was free from cultural and disability-based bias. (S-9; N.T. 47)
21. The GWR concluded that the Student's FSIQ did not meet the first condition of gifted criteria of 130 or above. The GWR indicated that after a review of multiple criteria that included Student's classroom performance, teacher rating scales, and curriculum-based and standardized assessments, the Student did not meet the second condition of gifted eligibility and did not demonstrate a need for

specially designed instruction that exceeded the general curriculum. (S-9, p.8, S-16; N.T. 34-25, 53-54)

22. The GWR recommended monitoring the Student because of demonstrated advanced verbal comprehension skills to ensure that enrichment beyond the general classroom was not warranted. (S-16, p. 9).
23. On September 22, 2023, the District provided the Parent with the GWR, a notice of recommended assignment (NORA), and notice of parental rights. (S-11)
24. On September 26, 2023, the Parent returned the NORA that determined the Student was not in need of gifted education. On the NORA, the Parent did not approve of the recommendation, citing missing relevant information, and requested a mediation and a meeting to amend the report. (S-10; N.T. 181)
25. After meeting with the District on October 5, 2022, through a re-issued NORA, the Parent disapproved the recommendation that Student did not need gifted education. The Parents requested mediation. (S-12, S-13)
26. On October 6, 2023, after meeting with the Parents, the District re-issued the GWR to include the Student's performance on MAP testing.⁴ Student's Fall 2022 ELA (RIT) score was in the 99th percentile, and math score was in the 90th percentile. Student's Winter 2023 ELA score was in the 95th percentile. Math was in the 86th percentile. In

⁴ NWEA MAP (Measures of Academic Progress) are validated for use as a progress monitoring tool. (N.T. 43)

Spring 2023, in ELA, the Student scored in the 78th percentile and in math in the 88th percentile. In fall 2023, the Student scored in the 97th percentile in ELA. In math, the Student scored in the 94th percentile. (P-4, S-16, p. 6-7, S-21, S-22; N.T. 41-42)

27. MAP testing alone is not used to determine eligibility for gifted programming. After meeting with the Parents, the District incorporated the Student's MAP testing scores in the GWR. The District's conclusion that Student was not gifted did not change. (P-4, S-16, p. 6-7, S-21, S-22; N.T. 41-42, 89)
28. In the District's database, the Student was identified as [redacted] after the GWR was issued, ethnicity was changed to [redacted]. (N.T. 47)
29. The District's differentiated instruction (MTSS) is used to meet the needs of the various learners in the classroom. The Student participates in the higher-level reading and math groups and is not the highest performer in those groups. (N.T. 38-39)
30. MTSS groups for math and reading are comprised of students of similar skill levels, with about half of the [redacted] grade falling in the higher-level reading and math groups. (N.T. 38-39)
31. On October 6, 2023, the Parents filed a due process complaint. (S-15)

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). 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 Principal, the Parent and the K-12 STEM supervisor testified. The District requested to introduce the testimony of the Student's current [redacted]-grade teacher, to which the Parents objected. The Parents' objection was sustained, and that witness did not testify. This hearing officer found the witnesses who testified to be generally 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

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

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 identification of 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 for purposes of identifying a thought to be 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 who has an IQ of 130 or higher or when **multiple criteria** as 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 consent is received to perform the evaluation.

Parents' Complaint

In their Complaint, the Parents contended the District's GMDE and subsequent GWR were flawed and reached the inaccurate conclusion that the Student was not gifted. Specifically, the Parents alleged the Student is [race redacted], the District failed to consider their input, improperly relied solely on the Student's FSIQ, and failed to afford appropriate consideration to "multiple criteria" that would have determined Student as gifted. For the following reasons, the Parents have failed to sustain their burden of proof.

First, the Parents failed to introduce compelling evidence that the District's GMDE 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). On the verbal comprehension, visual-spatial, fluid reasoning, working memory, and processing speed indices, the Student's standard scores ranged from 121 in the 92nd percentile to 103 in the 58th percentile. Based on those scores, the Student's full-scale IQ was determined to be 117 in the 87th percentile, 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. The Parents contend the District failed to attribute appropriate weight to the grade level equivalencies revealed in the WIAT-4 scoring report, resulting in an invalid GWR. To assess reading and math levels, the District administered the WIAT-4. Using age-level norms, the Student demonstrated advanced (very high range) reading comprehension skills and math problem-solving performance was regarded as high average. In interpreting these scores, the District provided credible testimony that although the Student’s reading level was above grade level as measured on that specific assessment, it did not fall within the range typically associated with a gifted learner, grade level equivalencies are not psychometrically sound for placement or diagnostic considerations, and other criteria indicative of giftedness were absent. The Student is appropriately grouped among peers and receives appropriate differentiated instruction within the general education classroom. Neither the District nor the Parent can rely on a single data point to rule in or rule out a gifted eligibility determination. In this case, the District carefully considered various other factors, as required by Chapter 16, to obtain a complete picture of this Student’s abilities.

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 [redacted]-grade teacher completed the Chuska Scales to assess the Student’s acquisition and retention rate of new academic content and skills. After analyzing the input, the District concluded that Student’s acquisition and retention rate of new material did not indicate giftedness. Although the Student was regarded as having high retention abilities, the acquisition rate was not as high, and based on the testimony of the

evaluating school psychologist, it was not indicative of giftedness. Although the *Chuska Scale*⁶ input from Student's teacher and other data revealed strong abilities, in the absence of the introduction of relevant evidence from the Parent, reaching an alternate conclusion, the District's determination was appropriate.

In applying the Chapter 16 multiple criteria, the District also 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 demonstration, awards and community involvement.⁷ Based on both Parent and educator input, Student is bright, motivated and ambitious. Other than the Parent's testimony, no evidence of a project, creative product or portfolio created by Student was introduced into the record. The Parents have not preponderantly established that Student has developed achievement or expertise sufficient to establish identification as a gifted learner under this criterion.

As additional criteria to determine whether a Student may be gifted, a District may consider early and measured use of high-level thinking skills, academic creativity, leadership and intense academic interest, communications skills, foreign language aptitude or technology expertise. The input from the Student's former teacher and Parents, outlined in the GWR, considered this necessary criterion. As stated in the GWR, the [redacted]-grade teacher regarded the Student's higher-level thinking skills and academic creativity as having a high probability of giftedness and leadership skills as having a low probability. The GWR further noted the

⁶Chuska Acquisition/Retention Rating Scales. PA Gifted Education Guidelines. May 2014

⁷ Gifted Education Guidelines, May 2014, Pennsylvania Department of Education

Student's strong interest in math and reading and well-developed vocabulary. No foreign language skills were noted, and the GWR indicated the Student's technology aptitude was commensurate with [redacted]-grade peers.

Finally, the GWR did not identify any factors or intervening issues that could mask gifted abilities. Although the Parents mentioned the Student was [race redacted], they failed to introduce any evidence that ethnicity affected the evaluation administration or impacted the final determination. The District properly concluded that no intervening issues like English as a second language, disability, gender or race bias, or socio/cultural deprivation that could have masked gifted abilities were evident.

Based on the totality of evidence, as the party with the burden of proof, the Parents failed to introduce any 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 of facts, 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.

These *pro se* Parents impressively and appropriately advocated for their bright and motivated child. However, on this hearing record, they have failed to sustain their burden of proof. The District properly evaluated the Student for gifted education services and utilized appropriate criteria for determining eligibility. The evaluation comprehensively assessed the Student's cognitive performance and academic and other abilities without

relying only on the FSIQ to conclude that Student was not gifted. The District has satisfied its responsibilities under Chapter 16.

ORDER

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

11/16/23