

*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.*

Due Process Hearing

BM (#7898/07-08 KE)

Date of Birth: [redacted]

Date of Hearing: September 10, 2007

Open Hearing

Parties to the Hearing

Parent

Parents

Representative

Hilary Andrew Kinal, Esq.

Transcript Received

September 15, 2007

Date of Decision

September 19, 2007

School District

Ambridge Area

Representative

Jocelyn Kramer, Esq.

Hearing Officer

David Y. K. Lee

## II. BACKGROUND

[Student] is a 10-year-old student in the Ambridge Area School District (hereafter District). He is in the fifth grade during the current 2007-2008 school year with a Gifted Individualized Education Program (hereafter GIEP). [Student] has been receiving acceleration by being placed one grade above in Reading. The parents requested a due process hearing opining that [Student's] GIEP was not properly implemented last year in fourth grade, and that he should skip fifth grade completely and be placed in a sixth grade classroom.

## III. FINDINGS OF FACT

1. [Student], whose date of birth is xx/xx/xx, is a student in the District. (S.D. #2.)
2. [Student] was identified as a Mentally Gifted student in first grade and has since received special education services. (P. #2 @ 2.)

3. In fourth grade last year, [Student's] GIEP indicates Speech and Language Support for 30 minutes per week, and Gifted Support (hereafter GS) for two hours per week. (P. #3 @ 1.)

4. Speech and Language Support is not an issue. (N.T. 18.)

5. [Student] was accelerated one grade in Reading and, therefore, is in six grade for Reading as a fifth grade student. (N.T. 153-164.)

6. [Student's] GIEP listed a number of annual goals in the area of Math enrichment, as well as several Specially Designed Instruction items. (P. #3 @ 10 & 12.)

7. There were several days of missed scheduling of enrichment classes during the 2006-2007 school year. (N.T. 21, 28, 167. P. #1.)

8. The parents requested a due process hearing by letter, dated July 10, 2007, to the District which was transmitted to the Office for Dispute Resolution on July 17, 2007. (ODR file.)

9. The parents obtained an Independent Educational Evaluation (hereafter IEE) in mid-August, 2007. (N.T. 54, 73. P. #11.)

10. A due process hearing session was held on September 10, 2007.<sup>1</sup>

#### IV. ISSUES

1. Was the GIEP appropriately implemented? (N.T. 5.)
2. Is [Student] entitled to compensatory education? (N.T. 9.)
3. Is it appropriate to advance [Student] one grade level in all areas? (N.T. 6.)
4. Are the parents entitled to reimbursement for the IEE? (N.T. 54.)

#### V. DISCUSSION AND CONCLUSIONS OF LAW

##### GIEP implementation

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<sup>1</sup> This matter was initially assigned to another Hearing Officer and scheduled for August 10, 2007. Due to the availability of witnesses and scheduling conflict, it was reassigned to this Hearing Officer and rescheduled for September 10, 2007.

According to records provided by the parents, there were seven missed days or missed sessions of GS due to the absence of a teacher or the confusion in scheduling. (F.F. #6.) This was not disputed by the District. The GIEP notes each session as two hours. (P. #3 @ 14.) The absence of a teacher due to medical reasons does occur. It is for such occasions that the District calls upon its list of substitute teachers in order for instruction to continue with as little interruption as possible. If there was a substitute or a change of schedule for a particular day, it is reasonable to expect that [Student] would be so notified and therefore not be excluded, albeit not intentionally. (N.T. 21, 28.) When GS occurs only once a week and there are a maximum of (180 school days/5) 36 weeks in a school year, missing seven sessions of GS constitutes essentially 20% of the total GS sessions. This amount is significant and must be deemed a denial of instruction as delineated in the GIEP. It is therefore determined that [Student] was denied (7 sessions x 2 hours per session) 14 hours of GS.

The parents also opined that [Student] was denied GS because he did not receive “one to one instruction” as indicated in the GIEP. (N.T. 19. P. #3 @ 12.) [Student] apparently started last year in fourth grade at [Redacted] Elementary and then moved shortly thereafter to [Redacted second] Elementary. (N.T. 12-13.) The GIEP was not revised to note the change. Since [Student] remained in the District although attending a different school building, to note such a change, while desirable for clarity in the GIEP, is not of consequence in terms of eligibility or placement. 22 PA Code §16.41(b) states that “Districts may use administrative and instructional strategies and techniques in the provision of gifted students which do not require, but which may include, categorical grouping of students...”. When [Student] moved from [Redacted] Elementary to [Redacted second] Elementary, GS was provided in a small group setting without being so indicated in the GIEP. (N.T. 169.) There was no evidence presented that [Student’s] need could not be met in an instructional grouping other than one-on-one. The change of instructional grouping in itself, although not so revised in the GIEP, therefore does not render the implementation of GS inappropriate.

The District did not dispute the parents' claim that [Student] did not participate in the [redacted event] (hereafter Game) as indicated in one of his annual goals due to the absence of the regular GS teacher. (N.T. 168. P. #3 @ 10.) This omission does not render the implementation of the whole GIEP inappropriate. It is reasonable, however, to expect the long-term GS substitute to continue the lesson plans and carry-out the necessary preparations for the Game. (N.T. 36.) Equity consideration would indicate the omission to be equivalent to one session, or two hours, of GS.

In dicta, the District is admonished to be more vigilant in updating information on the GIEP when necessary changes arise in order to avoid confusion and misunderstanding.

This Hearing Officer recognizes the limitation of time for all individuals involved. It is reasonable to expect that some changes, which may not be substantive relating to needs, may be made without reconvening the GIEP team.

Compensatory education

Compensatory education is an equitable remedy for missed services, and thus FAPE, that [Student] should have received.<sup>2</sup> The amount of compensatory education owed is to equal to the period of deprivation minus the time reasonably required for the District to rectify the problem.<sup>3</sup> In this instant case, there is not an evaluation to be conducted or a program to be developed to rectify the problem. [Student] is, therefore, owed a total of 16 hours (8 sessions at 2 hours per session) of compensatory education for the seven missed GS sessions plus the equivalent on one session for the missed Game.

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<sup>2</sup> Centennial Sch. Dist. v. Dept. of Educ., 517 Pa. 540, 539 A.2d 785 (1988); Brownsville area Sch. Dist. v. Student X., Pa. Commonwealth., 729 A.2d 198 (1999).

<sup>3</sup> M.C. ex rel. J.C. v. Central Regional School District, 81 F.3d 389, 108 (3d Cir. 1996).

The compensatory education hours are to be in addition to [Student's] school day and may not be used to replace needed services in school. The parent may select the form of the compensatory education, as long as it provides for the further appropriate enrichment and/or acceleration of [Student's] academic and/or social skills. The activities may take place, but not limited to, after school hours, during school breaks, or over the summer months. The costs to the District in the provision of the compensatory education may not exceed a special education teacher's salary (including fringe benefits) for the same period in which [Student] was denied FAPE. This Hearing Officer notes that the previously awarded compensatory hours have not been used. (N.T. 54-55.) The parties are urged to move forward in arriving at a program for [Student]. It is not in his interest not to do so.

Skipping fifth grade

This Hearing Officer notes that the issue of grade skipping was raised one year ago which resulted in a due process hearing. The District was ordered to re-evaluate [Student] in order to determine his performance levels, and was not ordered to have [Student] skip fourth grade altogether.<sup>4</sup> The District performed the re-evaluation and the parents did not provide a dissenting opinion to the Re-evaluation Report of September 19, 2006. (N.T. 132. P. #2.) The re-evaluation conducted by the District's psychologist resulted in scores that are not discrepant between his ability and achievement expectancy.<sup>5</sup> (N.T. 128-129. S.D. #3. P. #2.) A GIEP was subsequently developed<sup>6</sup> with the accompanying Notice of Recommended Educational Placement signed by the parent on September 25, 2006. (N.T. 16, 63. P. #3 & S.D. #2.) As a fourth grade student last year, [Student] received Reading instruction with fifth graders.

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<sup>4</sup> Hearing Officer's Decision re: B.M. v. Ambridge Area School District, August 14, 2006.

<sup>5</sup> WISC-IV VCI 121, PRI 123, FSIQ 121. WIAT-II Math Composite 121. (S.D. #3.)

<sup>6</sup> The District is advised to note that meetings should be at a mutually agreed on time. See 34 CFR §300.322 on parent participation.

Currently, [Student] is a fifth grade student who is accelerated in Reading by going to a sixth grade classroom for Reading. The District opined that [Student] is appropriately placed with his fifth grade peers in Math with enrichment. (N.T. 155-160, 174-175. S.D. #9.) The parents are of the opinion that [Student] should be able to skip fifth grade completely and be in a sixth grade classroom, not also for Math but, for all subjects based on their belief that [Student] is bored in school, and that being in the same grade placement for all subjects will provide more consistency in his daily schedule. (N.T. 51-53.) In support of their contention, an IEE, with test dates of August 12 and 17, 2007, was obtained. (F.F. #9.) The IEE concluded that "...class placement and appropriate curriculum for [Student] will be determined at the due process hearing...as the parents believe that he is in need of additional challenges that are not currently available in his current program...". (P. #11 @ 4.) The independent psychologist, testified at length on the Relative Proficiency Index (RPI) from the Woodcock-Johnson III Tests of Cognitive Abilities and Tests of Achievement, opined that [Student] is able to achieve with those who are one grade level above. (N.T. 80-90. P. #12.) The results were reported based

on norms<sup>7</sup> one grade above [Student's] placement. (N.T. 98.) Upon cross-examination, the independent psychologist admitted to using descriptors in the report that did not match the corresponding standard scores because of not using the same "reference point". (N.T. 101-102.) It was also ascertained that existing data were not reviewed, and school personnel were not contacted, in the preparation of the IEE report. (N.T. 99, 106.) Furthermore, the independent psychologist did not, or could not, address the specific issue of grade skipping which, in the final analysis, is and has been the parents' position.

Q. And based on your testimony, would it be a correct impression that you are leaning towards the question of advancement?

A. That is a question that I have been hesitant to answer.

Q. Why?

A. Because I don't have enough experience with gifted children who have been programmed in that way...skipping grades...has not been my experience that that last option is one that is very often used...so to have some sort of reference system for making that recommendation, I don't feel that comfortable with...

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<sup>7</sup> The scoring apparent was not with the updated NU edition. (N.T. 99-100, 145.)

(N.T. 107.)

In Schafer v. Weast, 126 S.Ct. 528 (2005), the U.S. Supreme Court held that the burden of proof in an administrative hearing challenging the adequacy of an IEP is upon the moving party. In this instant matter, the parents requested a due process hearing challenging the IEP in terms of its implementation and program placement. Aside from their own opinion that [Student] should skip fifth grade completely, their own witness was not in the position to make such a recommendation. The parents therefore did not meet the burden of proof on the issue of grade skipping.

IEE

The parents disputed the validity of the District's evaluation of September 19, 2006, because of the appearance of another name on the report. (N.T. 15-16. P. #2 @ 4.) It is unfortunate that a corrected copy was not subsequently provided to the parents.

However, there is no evidence before this Hearing Officer to indicate that it was more than an oversight. (N.T. 117-118.) The parents also did not indicate disagreement with the Re-evaluation Report by submitting a dissenting opinion. (N.T. 132.) 34 CFR §300.502(b)(1) states "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...".

An IEE, in this instance was obtained after the due process hearing was requested.<sup>8</sup> In fact, the IEE was conducted after the date of the initially scheduled due process hearing date of August 10, 2007, which was continued. It was clearly not part of the due process complaint notice in order for the District to respond. (P. #10.)

Parent-initiated evaluations. If the parents obtains an independent educational evaluation at public expense or shares with the public agency an evaluation obtained at private expense, the results of the

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<sup>8</sup> The IEE was conducted one month after the due process hearing request. (F.F. #8 & #9.)

evaluation-

(1) 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; and

(2) May be presented by any party as evidence at a hearing on a due process complaint...

34 CFR §300.502(c)

The IEE was disclosed to the District in preparation for the due process hearing.

The Multidisciplinary Evaluation Team and certainly the GIEP team would not have had the opportunity to consider it. The request for reimbursement was made in the course of the due process hearing during testimony of the parent. (N.T. 54.) It was indeed untimely in accordance with 34 CFR §300.502(b)(2) which states “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...”. Nevertheless, the District was given the opportunity to show that its evaluation was appropriate. (N.T. 57-59.) There is substantial evidence presented that the District’s evaluation was in accordance with statutory standards, and considered [Student’s] educational achievement and placement within the context of the District’s, specifically Math, curricula. (N.T. 123-134.) The parents certainly have the right to independent evaluations but not at public expense. Simply expressing disagreement with certain aspects, or the conclusion, of an evaluation does not render the evaluation inappropriate.

Therefore, it is hereby ordered:

## VI. ORDER

The LEA is ordered to take the following action:

1. The District is to provide [Student] with 16 hours of compensatory education in the manner consistent with the Discussion above.

The LEA is not ordered to take the following action:

1. The District is not ordered to reimburse the parents for the IEE.

2. The District is not ordered to advance [Student] to a sixth grade Math curriculum or to have [Student] skip fifth grade entirely.

September 19, 2007

Date

David Y. K. Lee

David Y. K. Lee  
Hearing Officer