

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

PENNSYLVANIA

SPECIAL EDUCATION HEARING OFFICER

Shawn D. Lochinger, Esq., PO Box 1146, Harrisburg, Pennsylvania 17108-1146

(Phone) 717-231-6696; (Fax 717-238-8622; (E-Mail) slochinger@rhoads-sinon.com

DECISION

Child's Name: M.B.

Date of Birth: [redacted]

Dates of Hearing: May 24, 2012

OPEN HEARING

ODR No. 3076 / 11-12 AS

Parties to the Hearing:

Parents

North Allegheny School District
500 Cumberland Road
Pittsburgh, PA 15237

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

Pamela Berger, Esq.
434 Grace Street
Pittsburgh, PA 15211

Michael L. Brungo, Esq.
One Churchill Park
3301 McCrady Road
Pittsburgh, PA 15235

May 31, 2012

June 7, 2012

Shawn D. Lochinger, Esq.

INTRODUCTION AND PROCEDURAL HISTORY

Student resides in the North Allegheny School District (“District”) and has been identified as gifted under the provisions of 22 Pa. Code §§ 16.1 – 16.65. Parents claim that the District is denying the Student an appropriate gifted education in that the District has proposed an inappropriate gifted education plan for the 2012/2013 school year by refusing to allow the Student to participate in Latin 1A.

ISSUE

Has the District proposed an appropriate gifted education plan to the Student despite refusing to enroll Student in Latin 1A for the 2012/2013 school year?

FINDINGS OF FACT

- 1) Student attends the District and is designated as a gifted student under the terms of 22 Pa. Code §§ 16.1 – 16.65 (Joint Exhibit (“J”) – 12) and (Notes of Testimony (“NT”) at pages 14, 17, and 18).
- 2) The Student’s most recent GIEP indicates that the Student “demonstrates global giftedness” (J-12).
- 3) Student has been accelerated in math during the current (2011/2012) school year (Student is taking a class one full grade level above Student’s current grade) (NT at 53-54, 91, and 117-118).
- 4) Student receives a compacted reading curriculum which also enables the Student to participate in a special gifted (“GOAL”) class (NT at 54, 86, 117-118, and 131-132).
- 5) Student also has the opportunity to utilize a pre-test procedure in science. At the start of each science chapter, the Student is given a test on the upcoming chapter. If the Student scores a 90% or higher, the Student does not have to attend classes that are germane to that chapter. During the time away from class, the Student works one-on-one with a gifted education teacher in various advanced science enrichment activities. The Student passed the pre-test from all but one chapter during the current school year (NT at 79-80, 117, and 133).
- 6) Student was offered the same opportunity of pre-testing in social studies but declined the invitation (NT at 83-84 and 110).

- 7) Student is offered a variety of independent options designed to enrich the Student's education at the District (NT at 56, 117, and 136). Student took advantage of at least 14 of these independent options during the 2011/2012 school year (J-10).
- 8) Student was also permitted to take Exploratory Latin/German during the 2011/2012 school year, despite the fact that this class was one full grade level above the Student's current grade level during the 2011/2012 school year (NT 33-35, 43-44, and 108).
- 9) The District normally offers two exploratory language classes to students in the District (Exploratory Latin/German and Exploratory French/Spanish) (Parents' Exhibit ("P") – 2). Students are required to take one of the two classes (NT at 172). Normally, the students who are required to take these classes are one full grade level above Student's current (2011/2012) grade level (NT at 172).
- 10) Each of the exploratory language classes covers one-half of a school year. Thus, a student who takes Exploratory Latin/German would have Latin for one marking period (45 school days) and German for one marking period (45 school days) (NT at 150).
- 11) Following requests by the Parents, the District permitted the Student to take Exploratory Latin/German during the 2011/2012 school year – one full year ahead of when the Student's classmates are eligible to take the class (NT at 43-44).
- 12) Student passed Exploratory German with a 99% (A) and, based on testimony from [Student's] teacher, is currently passing Exploratory Latin and "doing well" in the class (NT at 68 and 74).
- 13) Student has been exposed to Spanish, German, and French through a variety of summer camps and after school experiences (NT at 29-33).

- 14) Student has expressed a desire to take Latin 1A during the 2012/2013 school year (NT at 49).
- 15) Student would normally not be eligible to take Latin 1A until the 2013/2014 school year (P-1 at p. 10 of 10, P-2, and NT at 17).
- 16) The District offered Student the opportunity to take a second exploratory language class (Exploratory French/Spanish) instead of Latin 1A during the upcoming 2012/2013 school year (NT at 50 and 52).
- 17) Parents and Student rejected the District's offer to take Exploratory French/Spanish during the 2012/2013 school year (J-8).
- 18) Latin 1A is a full year language class that students at the District are permitted to take during the school year after each student has successfully completed the Exploratory Latin/German class (NT at 171).
- 19) Parents formally requested that Student be placed in the Latin 1A class, one full year ahead of schedule, as a means of providing an appropriate gifted education to the Student (J-8, NT at 52).
- 20) On April 13, 2012, the District issued a NORA indicating that the Student's request of acceleration into the Latin 1A class was rejected (J-8).

DISCUSSION AND CONCLUSIONS OF LAW

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 on 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.¹

Chapter 16 also provides for certain procedural safeguards as well as an obligation on the part of school districts 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. Substantively, school districts must provide gifted students "with a plan of individualized instruction (an 'appropriate program') designed to meet 'the unique needs of the child'." *Centennial School District v Department of Education*, 517 Pa. 540, 539 A.2d 785 (1988). However, and importantly, a school district's "obligation is not without limits....[T]he instruction to be offered need not 'maximize' the student's ability to benefit from an individualized program." *Id.*

Although Chapter 16 does not speak to the burden of proof in gifted due process proceedings, it has been clearly determined that said burden lies with the party which initiated the request for due process. *E. N. v M. School District*, 928 A.2d 453 (Pa. Commw. 2007). In this case, then, the burden of proof lies with the Parents.

It is also 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 specific credibility determinations made at this hearing, as relevant, are discussed below.

The Parents in this matter have brought one specific item to the attention of the Hearing Officer. Specifically, the Complaint stated and the parties agreed at the outset of the hearing that the sole issue in this case was the appropriateness of the student's GIEP for the 2012/2013 school year. More specifically, the parties agreed that the question of appropriateness was focused solely on whether the District's decision to deny Student Latin 1A was, in effect, a denial of an appropriate gifted education for the 2012/2013 school year (NT 20-21).

¹ 22 Pa. Code § 16.2.

The District, while agreeing that the Student is gifted, has offered what it believes to be an appropriate gifted education to the Student. The District first argues that the Student is already accelerated in math, taking a class that is a full year ahead of the Student's grade level. The Student has also been permitted to "pre-test" out of science – meaning that the Student is permitted to take a test *before* the class begins working on a specific science chapter. If the Student scores a 90% or above on the upcoming chapter test, the Student does not have to attend the specific classes where that chapter is being discussed. Instead, the Student spends the time with a gifted instructor on a one-to-one basis studying advanced science concepts. The Student has tested out of all but one chapter in science during the 2011/2012 school year and has thus studied a wide variety of advanced science matters (NT at 79-80). The District also indicates that the Student has been given the same "pre-test" opportunity in social studies (NT at 83-84). The Student has chosen *not* to take advantage of the offer in that class, however (NT at 83-84, 110).

The Student also has a "compacted" reading schedule. Instead of attending a required reading class five days a week, the Student attends only three days of reading class (while still completing the entire curriculum) and is thus freed to attend a gifted class ("GOAL") for the remaining two days of the week (NT at 54, 86, 117-118, and 131-132). Finally, the Student has been exposed to a great number of independent options, which amount to advanced learning "field trips" and activities sponsored by and through the District (NT at 56, 117, and 136). The Student has completed over fourteen (14) of these independent options (J - 10).

The main thrust of the District's argument, then, is that the Student's overall program is more than adequate to meet the Student's needs. The District thus believes it is clear that the proposed plan for 2012/2013 provides the Student with an appropriate education even without Latin 1A.

The District also argues that Latin 1A is not necessary because the District would be able to differentiate the Student's language classes for the 2012/2013 school year in a way that would provide a meaningful educational benefit to the Student. Specifically, the District argues that the Exploratory French/Spanish class that the District has offered the Student could be differentiated

to work concepts of Latin (including root words and language origins) into the course instruction in such a way as to allow the Student to progress in Latin during the 2012/2013 school year.

Finally, the District argues that the Student's GIEP does not show a specific need for the Latin 1A class. The District argues that there is no specific indication of giftedness in the foreign languages area. Thus, the District theorizes, the Student's request to take Latin 1A is best classified as a "want" or "desire" of the Student rather than a "need."

The Parents counteract these arguments by first indicating that the Student has already taken the required Exploratory Languages class during the current (2011/2012) school year. This class was taken by the Student (with District approval) one grade level earlier than all other students in the District. Despite this, the Student is doing well in the class. The Parents agree that in a normal situation, the Student would have been scheduled to take the Exploratory Latin/German class during the 2012/2013 school year. The Parents claim that since the Student has already taken Exploratory Latin/German, the next logical step is for the Student to take Latin 1A. Instead, the Parents' argue, the District is attempting to improperly force the Student to take a *second* Exploratory class which covers Spanish and French during the 2012/2013 school year. According to the Parents, the Student has already been exposed to Spanish and French through various summer and after school activities and that therefore the Student does not want or need to take an "exploratory" class that would do little more than expose the Student to languages that the Student has already been exposed to through the Student's past activities.

The Parents indicate that by forcing the Student to take the Exploratory French/Spanish class, the District would, in essence, be "punishing" the Student by requiring the Student to do more than every other student at the District. More clearly, the Parents state that every other student in the District decides on a full year language course in the year immediately following that student's completion of *one* Exploratory language class. Here, the Student would be able to choose and take a full year language course only after the Student has completed *two* such classes. The Parents indicate that although the District has packaged the additional language class as a positive thing (the Student would have a choice of four languages to select from in the

2013/2014 school year instead of two), the Parents view the offer as an extra hurdle or burden upon the Student that does not exist for any other student in the District.

The Parents' also dispute the contention that the District would be able to differentiate the curriculum in the Exploratory French/Spanish class in a way that would allow the Student to still learn Latin concepts. Finally, the Parents indicate that they believe that the reason for the District's denial of the Latin 1A class is actually based upon the administrative convenience of the District. The Parents' indicate that if the Student is permitted to take Latin 1A during the 2012/2013 school year, then the District would face difficult transportation and scheduling issues during the 2013/2014 school year. This difficulty would arise due to the fact that Latin 1B (which the Student would likely encounter in 2013/2014) is offered in a different building than the one Student would be attending at that time. In this regard, the Parents points to an e-mail between District personnel (P-1, p. 10 of 10) that, according to the Parents, indicates that the District is more concerned with the transportation needs of the Student during the 2013/2014 school year than it is with providing a proper education to the Student at the present time.

It is imperative to begin with the fact that this District provides, overall, a very strong gifted program to its students. The amount of opportunities available for gifted students in the District is quite remarkable. However, since gifted education is, at its core, individualized education, the District's overall program, while impressive, cannot carry the day for any specific student.

That being said, I have difficulty with the District's arguments that were presented in this case. The District, when confronted with the question of whether the Student should be permitted to take Latin 1A, effectively responds that the Student will not be offered Latin 1A because the Student is being accelerated in mathematics, allowed to pre-test out of science, and has a compacted reading curriculum. When re-questioned about Latin 1A, the District effectively responds that the Student will not be offered Latin 1A a year ahead of schedule because the Student attends a GOAL (gifted) class and can participate in various independent options. Again, while these acceleration and enrichment opportunities are very worthy offerings and certainly assist the Student's overall education, the District's reasoning is simply not

responsive to the issue at hand. More specifically, the District appears to be denying the Student an opportunity to take an accelerated foreign language class by indicating that the Student is being accelerated in math and science.

The District argues that the Student is not specifically gifted in the area of foreign languages. However, the District's own paperwork indicates that the Student "demonstrates global giftedness" (J-15, page 12 of 16). This would indicate that the District must take steps to ensure that the Student makes meaningful progress across *all* classes. Here, by denying the Student the opportunity to take Latin 1A during the 2012/2013 school year, the District inhibits such progress.

It is important to note that the District agreed to allow the Student to take an accelerated course in foreign languages during the 2011/2012 school year. The District did this by permitting the Student to take Exploratory Latin/German one full year before the Student was technically eligible or required to take such a class. One can only assume that this was done because the Student required said class in order to obtain an appropriate gifted education. Since the Student has started on that path, the District cannot now "pull back" from the acceleration and, in essence, put the Student into "neutral" for the coming school year absent some compelling reason for doing so. Here, no such reason was presented.

Instead, the evidence indicates that the District's denial of Latin 1A effectively blocks the Student's accelerated pathway. It does this by putting an additional qualification on the Student that no other student in the District must overcome – taking a *second* Exploratory Language class instead of the *one* that is required of all other students. The District tries to put a nice "bow" on this package by indicating that taking the second course will give the Student a choice of four languages when entering the 2013/2014 school year instead of the normal two choices that all other students face. However, putting a nice "bow" on the package does not make the "present" inside any better. The District, despite its maneuverings, is still requiring the Student to overcome an additional hurdle for no other reason than the fact that the Student is gifted and was able to take the Exploratory Latin/German class one year earlier than required.

Closely related to this is the District's argument that the Student's desire to take Latin 1A is a "want" and not a "need." This argument again misses the point of the Student's gifted education plan and the requirement that the Student make meaningful educational progress during the 2012/2013 school year under that plan. While it is true that the Student has expressed a desire to take Latin 1A, this is in keeping with what is required of every other student at the time each and every other student completes the Exploratory Latin/German class. At that time, every other student in the District must make a decision as to whether to take Latin 1A or German 1A and is scheduled accordingly for the next school year. The Student here has chosen Latin 1A. However, the District is attempting to force an additional obligation upon the Student that no other Student has been required to fulfill – taking a second Exploratory Language class that concentrates on two languages that the Student has already implicitly rejected by choosing German and Latin. Thus, while the Student may "want" to take Latin 1A immediately after completing Exploratory Latin/German, the Student is simply fulfilling the District's normal requirement that *all* students choose one of the two languages they were exposed to in the Exploratory class.

More importantly, requiring the Student to, in essence, sit out one full year of Latin will, in this Hearing Officer's mind, clearly hurt the Student's educational progress. Presently, the Student has been accelerated one year ahead of schedule in foreign languages. By forcing the Student to take one year away from Latin, any gains that were made during the 2011/2012 school year will be put on hold for an entire school year. The Student would then be placed back in with the Student's classmates for the 2013/2014 school year. At that time, the Student would, in essence, be *behind* those other students in real terms as those students would have taken the Exploratory Latin class more recently than the Student. While I have every faith that the Student would pick up Latin quickly again, there is currently a class available to the Student in the District that would allow the Student to continue to move forward along the Student's already accelerated path in foreign languages. Thus, I find that taking Latin 1A during the 2012/2013 school year is not just a "want," but that it is necessary in order for the Student to receive an appropriate gifted education.

Furthermore, I find that the District's argument that it could differentiate the Exploratory French/Spanish classes in a way that would allow the Student to continue to progress Latin to strain the bounds of credulity. While I have no doubt that the District could *attempt* to differentiate the curriculum in the Exploratory French/Spanish classes, differentiating it in a way that would allow the Student to make meaningful progress is simply not realistic or likely.

Finally, while it is not necessary for my ultimate finding in this case, I believe that it is necessary to deal with the transportation issue raised by the Parents if, for no other reason, than to serve as a cautionary tale. Parents argue forcefully that the District's decision to deny the Student the opportunity to take Latin 1A during the 2012/2013 school year is due, at least in part, to the fact that transportation and scheduling will become an issue for the District in the 2013/2014 school year. This is because the Student will be one year ahead of the foreign language curriculum and will have to move forward with the curriculum in a different building than the Student attends during the rest of the day during the 2013/2014 school year. Put more concisely, the Latin 1B class that the Student will likely take in 2013/2014 will be offered in a different building that the Student will attend during that school year. The parents argue that not only will this cause transportation woes for the District, but that the District will have scheduling and other issues during the 2013/2014 school year as a result of the Student's presence in a different building for part of the day.

The Parents support this argument with an e-mail that was sent from the Student's current Principal to the District's Assistant Superintendent and to the District's Director of Special Education. In that e-mail, the Principal makes a specific statement indicating "I am assuming we will not bus [Student] to [the other building] in [2013/2014] if [Student] takes a full year course in [2012/2013]" (P-1, p. 10 of 10). The e-mail becomes a greater concern based upon testimony at the hearing. During testimony, several District witnesses who testified about the e-mail did not address the issue in a credible fashion, but instead "danced" around the matter or dismissed it as being "irrelevant" without further explanation. In the end, the e-mail (which clearly states on its face that the District does not intend to bus the Student in 2013/2014 to another building to take the class), combined with the District's testimony (or lack thereof) about the transportation issue, leads to the conclusion that administrative convenience may have been factored into the

decision to deny the Student Latin 1A, a position expressly forbidden by Chapter 16 (22 Pa. Code §16.41(e)(5)). As stated above, while this finding does not have any specific impact on the decision in this matter, it is included here as a caution against using administrative convenience as a first response to matters such as this one.

Therefore, in this situation, I find that any GIEP for the 2012/2013 school year that does not allow the Student to take Latin 1A is not an appropriate GIEP. Accordingly, I will order the District to provide Latin 1A for the Student during the 2012/2013 school year.

ORDER

In accordance with the findings of fact and conclusions of law set forth above, the District is hereby ORDERED to provide the Student with a GIEP that includes Latin 1A for the Student during the 2012/2013 school year.

Shawn D. Lochinger
HEARING OFFICER

Date of Decision: June 7, 2012