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PENNSYLVANIA

SPECIAL EDUCATION HEARING OFFICER

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6709/05-06 KE

File Number

B.C.

Child's Name

Xx/xx/xx

Date of Birth

July 14, 2006

Date of Hearing

Open

Type of Hearing

**For the Student:**

Mr. and Mrs.

**For the Penn Manor School District:**

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Date of Hearing:

July 14, 2006

Date of Receipt of Transcript:

July 25, 2006

Date of Decision:

August 6, 2006

Hearing Officer:

Daniel J. Myers

## **BACKGROUND**

Student is an xx-year old, 7th grade resident of the Penn Manor School District (School District). Last year, while a 6<sup>th</sup> grade elementary school student, Student completed two of the School District's high school level math courses. During the upcoming school year, when Student will be a 7<sup>th</sup> grade middle school student, he will be taking a high school level Geometry-Trigonometry course. The parties do not dispute the educational program and placement contained in the School District's proposed gifted individualized educational program (GIEP.)

The dispute between the parties is whether Student should receive credit toward completing high school courses while still in elementary and middle school. The School District's policy is not to award graduation credit to elementary and middle school students who take high school level courses. Student argues that he should receive credit toward graduation for any high school course that he successfully completes, regardless of whether he is an elementary, middle or high school student.

For the reasons described below, I find for the School District. Student has a gifted education need for high school level math instruction, not high school graduation credit. I conclude that the School District has met its obligation to appropriately address Student's gifted education need. Because the award of graduation credit is not required for the provision of an appropriate gifted education to this Student, any concerns regarding the merits of the School District's graduation credit policy is a matter of local school district governance over which I have no authority to intrude.

## **ISSUE**

Whether Student should receive credit toward graduation when he successfully completes high school courses while he is still in elementary and middle school?

## **FINDINGS OF FACT**

1. Student, whose date of birth is xx/xx/xx, is an xx year old, 7<sup>th</sup> grade resident of the School District at the Middle School. (P 2)<sup>1</sup>
  - a. Student is a gifted student who acquires new information at an incredibly fast rate and who requires little or no repetition before mastering new mathematical concepts. (N.T. 48)
  - b. Student is motivated by competition and by the inner pursuit of knowledge. (N.T. 52-53, 100-101) There is no evidence in the record that the receipt of graduation credit motivates Student. (N.T. 102)

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<sup>1</sup> References to "N.T." are to the transcript of the July 14, 2006 hearing session. References to "H.O.," "P.," and "SD" are to the exhibits of the Hearing Officer, Parent, and School District, respectively.

2. At some point during elementary school, Student was accelerated by skipping one grade. (N.T. 139) Because of his acceleration via grade-skipping, Student is on track to graduate in less than the usual 13 years (grades K-12) of his age-appropriate peers. (N.T. 174-175)
3. During the last school year (2005-2006), while still in elementary school as a sixth grade student, Student completed two high school level math courses, Algebra I and Algebra II, receiving As in each course. (P 9; P 23; N.T. 33-34, 37, 40-41, 50-51, 53, 59-61, 122-123, 190)
4. On or about May 31, 2006, the School District proposed a GIEP for the upcoming school year (2006-2007). (P 2)
  - a. Student will take the School District's high school level Geometry/ Trigonometry math course, which is typically taken in 10<sup>th</sup> grade. (P 2; P 24; N.T. 34-35, 83, 131, 190)
  - b. The parties do not dispute the appropriateness of the programming contained in School District's proposed GIEP. Their only dispute is whether Student should receive credit toward graduation for his successful completion of high school level courses while in elementary and middle school. (P 1; P 2; N.T. 77-78)
5. In January 2006, as a possible resolution to the parties' dispute regarding graduation credit, the School District's superintendent suggested accelerating Student past middle school (7<sup>th</sup> and 8<sup>th</sup> grades), directly to high school (9<sup>th</sup> grade.) (P 8; N.T. 73, 96, 139)
  - a. Academically, Student is capable of attending classes in the high school. (N.T. 79, 141-142) Further, if Student is classified as a 9<sup>th</sup> grade high school student, even though he is only 11 years old, then he would receive credit toward graduation for the Geometry/ Trigonometry math course. (N.T. 92-93)
  - b. Student's parents rejected this suggestion out of concern for his adjustment to so much grade acceleration. (P 1; N.T. 98, 139, 141)
6. This School District is structured with three types of schools: K-6<sup>th</sup> grade elementary school, 7<sup>th</sup> and 8<sup>th</sup> grade middle school, and 9<sup>th</sup>-12<sup>th</sup> grade high school. (N.T. 57)
7. The School District's Promotion and Retention Policy No. 215 states that "each student shall be moved forward in a continuous pattern of achievement and growth that corresponds with his/her own development and coincides with the system of grade levels and academic standards established for each grade." (P 15)
8. The School District's Grade Acceleration Policy No. 206.1 states that "[t]he district strives to meet the needs of all students in a manner that challenges and motivates. The acceleration of elementary students is one possible option to achieve this goal...the district has established these guidelines for considering the acceleration of elementary students." (P 7) This Policy applies only to elementary school students, and not to high school and middle school students. (N.T. 85)

9. The School District's Graduation Requirements Policy No. 217 states that "[t]he requirement for graduation shall be the completion of work and studies representing the instructional program assigned to grades 9 through 12," and that "[t]he Board shall award a regular high school diploma to every student...who meets the requirements of graduation established by this Board." (P 5; N.T. 107, 149) This Policy does not permit the graduation of any pre-high school student. (N.T. 87, 149-152, 156)
10. The School District's 2002 strategic plan states that students require four credits in math to graduate. (N.T. 69-70)
  - a. The School District's high school course selection guide lists three math sequences available to students for completing their 4-credit math requirement, one of which is the Honors math sequence. (SD 1; P 10; N.T. 45)
  - b. At the rate of Student's math learning, it is possible that he will complete nearly the entire 4-credit Honors math sequence before reaching high school. (N.T. 48)
11. The School District is consistent in the application of the policies at issue in this case, even where School District officials were not certain of the pedagogical underpinnings of those policies. (N.T. 87, 149-152, 156)
  - a. It has denied graduation credit to other elementary school and middle school students who have taken high school level courses. (N.T. 53, 111, 192)
  - b. All high school students are required to spend four years securing their graduation credit, even when students spend some, or even all of their high school senior year in college taking college level courses. (N.T. 88, 109, 145-146, 155, 176, 189) Under those circumstances, the students return to the high school to graduate with their graduating class. (N.T. 162-163, 176, 189)
  - c. While some students have been accelerated in elementary school pursuant to Policy No. 206.1, no high school students have ever been accelerated. (N.T. 177)
12. On June 16, 2006, Student's parents requested a due process hearing. (P 1) A due process hearing was conducted in this matter on July 14, 2006. School District exhibit SD 1 was admitted into the record without objection. (N.T. 195) Student exhibits P1 – P 24 were admitted without objection. (N.T. 194) I first received a transcript of the July 14 hearing on July 19 and, for reason(s) that I do not know, I received an apparently corrected transcript on July 25, 2006, which is labeled "Volume Two." This "Volume Two" transcript accurately reflects the entire July 14 hearing and is the transcript upon which this decision is based.
13. This decision is issued:
  - a. 51 days after the due process hearing request; and
  - b. 12 days after my receipt of the hearing transcript.

## DISCUSSION

Several issues have been raised in this matter, which will be discussed in detail below. The bottom line, however, is that I find that the School District has offered an appropriate gifted education to Student and that it is not required to award graduation credit to Student for the high

school level courses that he has, and will, complete in elementary and middle school. Student has a gifted education need for high school level math instruction, not high school graduation credit. Any dispute regarding the merits of the School District's graduation credit policy is a matter of local school district governance to be reviewed, if at all, in a different forum than this one.

The first of the various issues raised in this matter concerns the burden of proof. The School District argues that, because Student's parents requested the hearing, they bear the burden of persuasion to prove that Student's GIEP is inappropriate. See Schaffer v. Weast, 126 S. Ct. 528 (2005) Student, on the other hand, argues that the School District has the burden to show that it has offered an appropriate, individualized gifted program to the Student to meet his educational needs. Student cites to a pre-Schaffer Appeals Panel decision to support his argument. In Re Student and the Palisades School District, Special Education Appeal No. 1525 (2004) (Noting that the hearing officer had determined "that the District had not met its burden to show it had provided an appropriate, individualized gifted program...") See also J.P. v York Suburban School District, Special Education Appeal No. 1536, fn. 51 (2004)

Recently, an appeals panel addressed precisely this issue and concluded that the School District does bear the burden of persuasion, because: 1) gifted education is authorized strictly through state statutes and regulations; and 2) Schaffer v. Weast is a federal case based on interpretation of federal law; and 3) no court has yet applied Schaffer's federal burden of proof reasoning to a strictly state issue. In Re D.D. and the North Penn School District, No. 1737 (2006) In that case, however, the Appeals Panel also noted that, even if Student's parents did bear the burden of proof, they "wholly and clearly met any such burden" in that particular case. Id.

I wonder whether these arguments regarding burden of proof mix two distinct legal concepts, i.e., burden of persuasion and legal presumption. (N.T. 19-20) The unspoken question that I perceive is whether, when a party fails to meet its burden of proof, the opposing party's position will thereby be presumed to be correct by default. In other words, if the parent has the burden to prove that a GIEP is inappropriate, and if the parent fails to meet that burden, will the GIEP be presumed, by default, to be appropriate? Conversely, if the School District has the burden to prove that a GIEP is appropriate, and if the School District fails to meet that burden, will the GIEP be presumed, by default, to be inappropriate?

This question is not unreasonable, and is based upon the serious practical effects of, for example, a witness failing to appear on the day of hearing to help a party meet its burden of proof. In a criminal prosecution, there is indeed a presumption of innocence concomitant with the prosecution's burden of proof and, indeed, a defendant is presumed innocent if the state fails to prove his or her guilt. I suspect, however, that there is no similar mingling of legal burdens and legal presumptions in gifted education cases. I believe that a party's failure to meet its burden of proof in a gifted case simply means that not enough evidence was presented at a particular hearing (for whatever reason) to persuade the decision maker of a particular party's position – it does not necessarily vindicate or prove the opposing party's position.

Respectfully to the Appeals Panel in North Penn School District, *supra*, I have difficulty accepting its reasoning that the underlying principle in Shaffer v Weast is inapplicable to gifted cases simply because gifted education is a state-generated right and/or because no courts have yet to weigh in on the matter. I think that the general principle of Shaffer v Weast, i.e., that the complaining party bears the burden to prove its complaint, should apply to gifted cases just as it does to special education cases.

Thus, I think that Student, who contends that the School District is denying him an appropriate education by refusing to grant high school credit for courses taken in elementary and middle school, should bear the burden of persuasion on this issue. I do not think this means, however, that the School District now enjoys a presumption of appropriateness if Student fails to meet his burden his proof. I think it simply means that if Student contends that a School District proposal is inappropriate, then Student's evidence of inappropriateness must outweigh the School District's evidence of appropriateness.

All of this is merely academic musing, however, in this particular case. The parties do not dispute the appropriateness of the programming contained in the School District's proposed GIEP. Their only dispute is whether Student should receive credit toward graduation for his successful completion of high school level courses while in elementary and middle school. (P 1; P 2; N.T. 77-78) When I weigh the evidence in this record, I find in the School District's favor. Thus, if Student bears the burden of proof in this case, then I conclude that the evidence weighs in favor of the School District's position. If the School District bears the burden of proof in this case, then I conclude that the evidence weighs in favor of the School District's position. Either way, I find as described in greater detail below, that the School District's GIEP meets Student's gifted education needs and that those needs do not include a need for graduation credit.

The term "Gifted Education" is defined as specially designed instruction to meet the needs of a gifted student. 22 Pa. Code §16.1 The School District must provide opportunities to participate in acceleration or enrichment, or both, as appropriate for the student's needs. These opportunities shall go beyond the program that the student would receive as part of a general education. 22 Pa. Code §16.41(a)(b); See generally, Centennial School District v. Department of Education, 617 Pa. 540, 539 A. 2d 785 (1988); Brownsville Area School District v. Student X, 729 A. 2d 198 (Pa. Cmwlth. 1999)

Student clearly has a need for high school level math instruction. The School District met this need during the last school year (2005-2006) when it instructed Student in both Algebra I and Algebra II courses while he was still in elementary school as a sixth grade student. (P 9; P 23; N.T. 33-34, 37, 40-41, 50-51, 53, 59-61, 12-123, 190) The School District will meet Student's educational needs next year when it will offer to him, while he is in 7<sup>th</sup> grade middle school, the high school level Geometry/ Trigonometry math course, which is typically taken in 10<sup>th</sup> grade. (P 2; P 24; N.T. 34-35, 83, 131, 190)

I looked throughout this record for evidence indicating that, in addition to a need for high school level math instruction, Student also has a need for graduation credit. For example, perhaps I could have found that Student had an educational need for graduation credit if that was what motivated him in school. That does not appear to be the case, however. While Student is

motivated by competition and by the inner pursuit of knowledge, there is no evidence that the receipt of graduation credit is a motivator for Student. (N.T. 52-53, 100-102)

In Saucon Valley School District v. Robert and Darlene O., 785 A.2d 1069 (Pa. Cmwlth. 2001) a 17 year old gifted high school student who was considered to be a member of the graduating class of 2002 when he began high school in 1998, sought to graduate with the class of 2001, apparently because the class of 2001 was required to complete fewer total credits for graduation than the class of 2002. (In the instant case, Student's parent made it clear that he is not seeking to have Student qualify for any lower number of graduation credits than those that will be required of his age-based peers. N.T. 116)

In Saucon Valley, supra, one hearing officer ordered that Student be given graduation credit for two of the four high school level courses that he took while in middle school. That decision was not appealed. On the appeal of a subsequent hearing officer's decision in a later case, the Appeals Panel found that Student's GIEPs had been so flawed procedurally and substantively that he was entitled to five semesters of accelerated and enriching coursework in math and science, for which he was entitled to graduation credit, and that he should be re-classified from the class of 2002 to the class of 2001.

Ruling that the Appeals Panel exceeded its authority when it reclassified Student as a member of the class of 2001, the Commonwealth Court observed that the School District has the authority to set graduation requirements, and that it exercised its statutory authority when it chose to set graduation requirements based upon the year of a student's high school matriculation (i.e., entrance into the high school body.) Because the Student in Saucon Valley matriculated into high school in 1998, he was subject to the graduation credit requirements applicable to the class of 2002. The Court observed in a footnote that it was not addressing whether the Appeals Panel (and presumably a hearing officer) has the authority to grant graduation credit for pre-high school courses.

In the instant case, Student argues that Saucon Valley supports his position that a Pennsylvania Hearing Officer may order a School District to grant credit for high school level courses taken before high school. I disagree. First, Commonwealth Court explicitly limited its analysis in Saucon Valley to whether the Appeals Panel had the authority to classify a student as a member of another class. Second, had Commonwealth Court considered the issue, it is quite possible that it would have concluded that the Appeals Panel (and presumably a Hearing Officer) does not have the authority to grant credit for pre-high school courses, under the same analysis applied to the graduating class reclassification issue.

In reversing the Appeals Panel's reclassification order, the Commonwealth Court noted:

The General Assembly has vested local school districts with the authority to set up its own requirements for graduation from its schools and to confer academic degrees on those who successfully complete such requirements.

Saucon Valley School District v. Robert and Darlene O., 785 A.2d 1069 (Pa. Cmwlth. 2001), citing Woodland Hills School District v. S.F., 747 A.2d 433, 435 (Pa. Cmwlth. 2000)

It appears to me that, similar to determining which graduation class a student will belong to, the award of graduation credit falls within a local school district's authority "to set up its own requirements for graduation from its schools and to confer academic degrees on those who successfully complete such requirements." Absent evidence of an elementary school or middle school child's educational need for graduation credit, which I have already concluded is not found in this particular record, it does not appear that I have any authority to intrude upon the local School District's decisions setting up its own requirements for graduation.

Finally, for what it's worth, I note that the student in Saucon Valley had already matriculated to the high school when the Hearing Officer ordered that the school district award credit for high school level courses taken in middle school. Possibly, as a matriculated member of the high school student body, a student might have a stronger legal interest in and/or a stronger educational need for and/or a stronger entitlement to, high school graduation credit than would an elementary or middle school student, such as in the instant case, who has not yet matriculated into that body of students to whom the School District's graduation credits policy No. 217 applies. (P 5; N.T. 87, 107, 149-152, 156)

### CONCLUSION

Accordingly, I will order that Student's GIEP is appropriate and is not required to include credit toward graduation for completion of high school level classes.

### ORDER

For the reasons described above, I ORDER that:

- Student's GIEP is appropriate; and
- Student's GIEP is not required to include credit toward graduation for completion of high school level classes.

*Daniel J. Myers*

Hearing Officer

August 6, 2006

Re: Due Process Hearing  
6707/05-06 KE