

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

## DECISION

Due Process Hearing for D.F.

ODR File No. 6312/05-06 AS

Date of Birth:           xx/xx/xx

Dates of Hearing:       April 4 and 11, 2006 – Open Hearing

Parties to the Hearing:

Representative:

Parent(s)

Mark Voigt, Esq.  
Plymouth Mtg. Executive Campus  
600 W. Germantown Pk., Ste. 400  
Plymouth Meeting, PA 19462

North Penn School District  
401 E. Hancock St.  
Lansdale, PA 19446-3961

Mark W. Fitzgerald, Esq.  
Sweet, Stevens, Tucker & Katz  
P.O. Box 5069  
New Britain, PA 18901

Hearing Officer:       Debra K. Wallet, Esq.

Record Closed:         April 19, 2006 (filing of briefs)

Date of Decision:       May 4, 2006

BACKGROUND:

Student [hereinafter Student] is [a pre-teenaged] (date of birth xx/xx/xx) fifth-grade student in the North Penn School District [hereinafter School District].

Since the first grade, Student has been identified as gifted and has had a Gifted Individualized Education Program [hereinafter GIEP]. This case is governed by the state regulations pertaining to gifted education. 22 Pa. Code Chapter 16 [hereinafter Chapter 16]. Parents argue that for some time the School District has failed to provide an appropriate program under Chapter 16 and they request immediate grade acceleration. They contend that Student has been bullied by another fifth grade classmate which has contributed to the inappropriateness of the educational opportunities provided. As a further remedy for the denial of an appropriate program, Parents request compensatory education for the fourth and fifth grade years.

The School District maintains that additional testing is required to make a determination about whether Student should be accelerated in grade. No reevaluation has occurred because Parents have refused to sign the permission forms. According to the School District, the Student's needs have been addressed in a pull-out gifted setting as well as in the regular classroom. No compensatory education is due to Student, but if it is awarded by the Hearing Officer, the award should be limited to one year and limited to education available within the existing curriculum.

ISSUES:

1. Have Parents filed their claim within the applicable statute of limitations?
2. Did the School District provide Student with appropriately designed instruction based on the Student's needs and ability during the fourth and fifth grade years?

3. Did the conduct of a fellow student, interfere with the School District's ability to provide an appropriate specially designed instruction based on the Student's needs and ability?
4. Is a reevaluation necessary to determine acceleration (grade-skipping)?
5. Are Parents entitled to any equitable remedies for violations of Chapter 16? If so, what remedies?

## FINDINGS OF FACT:

### Background

1. Student is [a pre-teenaged student] (date of birth xx/xx/xx) who resides with Parents within the School District. Student is currently in the fifth grade. (S-9, p. 1).
2. On February 13, 2006, through counsel, Parents requested a Due Process Hearing. (S-17).
3. Both parties participated in a pre-hearing telephone conference on March 29, 2006 during which there was general agreement about what must be decided by the Hearing Officer.
4. A hearing scheduled for March 2 was continued at the joint request of the parties. Hearings were held April 4 and April 11, 2006.
5. The following exhibits were admitted: School District Exhibits S-1 through S-38 (N.T. 467) and Parents Exhibits P-1 through P-25 (N.T. 605).
6. The School District called eight witnesses: the Principal, school psychologist, fifth and sixth grade regular education teachers, guidance counselor, reading specialist, teacher of the gifted, and the administrator of the gifted program. The Parents called one witness: Student's mother.

### Identification as Gifted

7. In October 2001, Student was identified in the first grade as being eligible for specially designed instruction as a gifted student. He scored a full scale I.Q. of 129<sup>1</sup> on the

---

<sup>1</sup> An IQ of 130 is a common cutoff, but the regulations permit a person with an IQ lower than 130 to be admitted to the program "when other educational criteria in the profile of the person strongly indicate gifted ability." 22 Pa. Code § 16.21.

Weschler Intelligence Test for Children Third Edition, (WISC III), but earned sufficient points on the School District's matrix summary to qualify for the gifted program. (S-1).

8. The report was written by the school psychologist using the WISC III and the Burns and Roe Reading Inventory. (N.T. 26-28). Although the Burns and Roe scores are reported as having been at the third grade, the reading specialist testified that this was an error and should have stated Student was reading at a second grade level. (N.T. 310).

9. The birthday cutoff when enrolling a student in a particular grade is September 15. Student was born xxxxx, [a number of] weeks after the cutoff. (N.T. 97).

10. The last gifted multidisciplinary evaluation occurred in first grade.

11. Student was tested in the third grade using the Pennsylvania System of School Assessment (PSSA) in reading and mathematics. Student scored in the top quartile in both categories: in the 97<sup>th</sup> percentile in reading and the 94<sup>th</sup> percentile in mathematics for grade three. (S-25; N.T. 51-52). The PSSA test is not a test for giftedness. (N.T. 85).

12. In the middle of the fourth grade, in February, 2005, Student was assessed using the TerraNova. Student scored in the 99<sup>th</sup> percentile in every subject tested: reading, language, and mathematics. (P-25, pg. 83; N.T. 85-86). According to the school psychologist the TerraNova is not a "nationally-normed test" which can be used for purposes of Chapter 16 identification. (N.T. 136).

#### GIEP's

13. A GIEP team meeting occurred November 23, 2004. Parents attended this meeting, but no representative of the LEA attended. (N.T. 34-35; 59).

14. Parents approved the Notice of Recommended Assignment (NORA) for gifted education placement as a result of the November, 2004 GIEP meeting. (S-3).

15. The last approved GIEP is dated November 23, 2004 (S-2). It consists of all of the relevant parts provided in Chapter 16, 22 Pa. Code §16.32(e), but it fails to provide any objective criteria for determining whether the goals and learning outcomes are being achieved. The Present Education Levels provided only report card grades but no indication of whether Student is reading at a fourth, fifth, or sixth grade level. It indicates report card grades as follows: Reading: strongly in place; Math: A; Science/Health: A; Social Studies: A; Written Expression: Advanced; Rate of Acquisition: High; and Rate of Retention: High. (S-2, pgs. 2-4; N.T. 61-62). Annual goals were described in this GIEP as follows: 1. To help the student monitor his educational progress effectively; 2. To help the student to develop and refine communication skills; 3. To develop and refine research skills; 4. To develop and refine higher level thinking skills; 5. To develop and refine creativity. Very general short term learning outcomes were provided under each annual goal. Assessments were to be done through teacher observation and reviews. Needs were described as challenges in all academic areas,

opportunities to practice multi-step math problems, and science opportunities. The specially designed instruction included regular seminar and Adapt Time, in-class enrichment, independent projects, group discussion, and computer activities among other things.

16. The GIEP team met November 18, 2005, which meeting resulted in a GIEP providing for a slight modification of the 2004 GIEP. It added a new annual goal: “6. To develop and refine affective [sic] awareness skills.” (S-6).

17. Parents refused to sign this GIEP and encouraged the School District to allow Student to work with the sixth grade. (S-8).

18. A GIEP meeting on January 25, 2006 resulted in a GIEP with substantially the same annual goals as the prior GIEP. Leadership and public speaking opportunities were added to the specially designed instruction, but very little change was made to any other area. (Compare S-9 with S-6).

19. No one from the School District requested a due process hearing after Parents refused to sign the GIEP in January, 2006. (N.T. 78).

20. On January 25, 2006 the School District sent a “Permission to Evaluate-Gifted” to Parents advising them that an evaluation was needed “to assess eligibility for the Gifted Program.” (S-10).

#### Witnesses

21. Mr. W is the building principal of the elementary school where Student attends. (N.T. 21). Mr. W explained that there are 22 students in the gifted program in his school. The program consists of a pull-out program three days a week with a resource teacher who splits her time between two buildings. (N.T. 23).

22. On September 4, 2005, Parents sent an email to the principal complaining that Student had been placed in a class with a “student with a history of giving [Student] ‘difficulty.’” (S-7; N.T. 29-30). This student has been identified as “[redacted].” Parents were generally concerned about the placement and believed that Student should have been in another class grouping. The principal testified that he conducted an investigation by speaking with the second and third grade teachers and the guidance counselor. He also talked with cafeteria aides and recess teachers. He concluded that there was no direct evidence of any harassment from this peer and the classroom placement remained the same. (N.T. 30-33).

23. The principal pointed Parents to a written School Board policy concerning harassment (S-30) but the Parents did not complete a complaint form until late March, 2006. (N.T. 33-34).

24. The Principal concedes that no LEA representative attended the GIEP meeting on November 18, 2005. (N.T. 34-35; 59).

25. Parents did not approve the NORA issued November 18, 2005 or the second request on January 20, 2006. (S-6, pg. 2; N.T. 35-36).

26. As a result of the November 18, 2005 GIEP meeting, Parents raised concerns about the appropriateness of the placement and first discussed possible acceleration for their son. (S-8; N.T. 36-37).

27. Mr. W testified that the School District has a written policy regarding grade acceleration in mathematics. (S-35; N.T. 37-38). He admitted that very few students in the School District have been accelerated in mathematics. (N.T. 38).

28. On January 25, 2006 a testing permission form was sent to Parents to allow for the completion of the TOMAG (Test of Mathematical Abilities for Gifted Students). Parents signed this form but failed to check one of the boxes either giving permission or not giving permission. (S-11; N.T. 43).

29. The guidance counselor returned the form to the Parents on February 6, 2006 and requested that they check one of the blocks giving permission for testing. (S-14). A follow up letter was sent on February 22, 2006 and evidence was presented of receipt by Parents. (S-15). No response has yet been received from Parents according to the principal. (N.T. 44-45).

30. Also on February 22, 2006 the school psychologist sent a Permission to Evaluate-Gifted requesting that the form be returned to allow for a psychological evaluation in the areas of intelligence, academics, social and emotional adjustment in addition to the completion of certain check lists. (S-34; N.T. 116-117).

31. The TOMAG is administered by the guidance counselor, not the school psychologist. There was no recommendation for the reassessment of gifted qualities in any subject besides math. (N.T. 83-84).

32. On March 27, 2006, Parents responded by explaining that they were waiting for the School District to request permission for another test which could be given in addition to the TOMAG as discussed at the January 25, 2006 meeting. Parents expressed disappointment that very few students in the School District had ever been accelerated even in math and they wanted to protect their son from further disappointment. Parents questioned the motivation of the school to act in Student's best interest. They wanted Student to take both math related exams in close proximity. (S-21; S-22).

33. According to the Principal, Student is one of the highest achieving fifth graders, but he testified that current data is needed to determine whether or not advancement or acceleration should be made in any subject areas. (N.T. 52-53).

34. The principal conceded that the Pennsylvania Department of Education "Gifted Guidelines" dated 2004 (P-21, pg. 33) are to be followed by the School District. (N.T. 64).

35. In the four years the principal has been at his current elementary school no students have been accelerated in mathematics. Very few students have been accelerated district-wide in math. (N.T. 69-71).

36. There is no written policy for advancement in any subject other than mathematics. (N.T. 71).

37. After receipt of a formal complaint of harassment on March 30, 2006, the principal stated that he will conduct a formal investigation including contact with the alleged bullier and redacted] parents. A report with findings will be submitted to the Director of Elementary Education as well as the District Superintendent. (N.T. 71-74).

38. Ms. S is a certified school psychologist at the elementary school attended by Student. She is in her 20<sup>th</sup> year at the school with 29 total years in the field of psychology. (N.T. 98-100). She has a Master's Degree in educational psychology. (N.T. 119).

39. Ms. S conducted the initial evaluation in Student's first grade and did the I.Q. testing herself. (N.T. 103-108).

40. The permission to evaluate issued to the Parents should have been a permission to reevaluate, according to Ms. S. (*See S-10*; N.T. 110-111). Ms. S did not realize the mistake until the due process hearings and never gave the Parents a different form. (N.T. 132; 143).

41. Ms. S testified credibly that she felt more current information was needed to determine whether Student was achieving a year above grade level or significantly higher in his academic subjects. If Student was achieving one year above grade level she felt this could be addressed in the current classroom. (N.T. 113-114). Ms. S explained that in advancing a student to a higher grade level there could be implications down the road. For example, when the child gets to high school Student could be with a peer group which is driving automobiles while the accelerated child would not be doing so. (N.T. 118-119). The Hearing Officer accepts this testimony because of her experience and credentials. Further, it appears to be a reasonable approach to the issue of grade acceleration.

42. In her 20 years as school psychologist with the School District, Ms. S is aware of two cases of acceleration just in mathematics and possibly full grade acceleration. These did not occur in the elementary school where Student attends. (N.T. 133-134).

43. Ms. S wants to do an intelligence test such as the WISC IV as well as a BASC and a Children's Manifest Anxiety Scale Revised. She testified that none of these tests were specifically mentioned at the January 25, 2006 GIEP meeting with the Parents present. (N.T. 143-145).

44. Mr. M instructed Student as his regular fourth grade teacher. He has a degree in elementary education from Slippery Rock University and a Master's equivalency. He holds an

Instructional 2 certificate and has had 17 years of elementary school teaching experience. (N.T. 146-149). The Hearing Officer finds that Mr. M was an extraordinary teacher who had an exceptional relationship with Student as evidenced by the complementary letter submitted by Parents. (S-4). Mr. M described his methods of providing enrichment within the regular classroom to Student in the fourth grade. (See e.g. N.T. 151-156).

45. Ms. M is the elementary guidance counselor where Student attends school. She has 34 total years as guidance counselor plus additional therapy experience. She has a Bachelor of Science degree in elementary education from Kutztown University, a Master's in education in elementary counseling as well as post-graduate work in the area of child development. She is certified as an elementary education teacher, has permanent certification as an Education Specialist 2 and as an elementary guidance counselor. (N.T. 187-189). When she learned of the allegations of bullying Ms. M offered conflict resolution and peer mediation to the Parents. They did not want to proceed because they did not want her to talk with Student. (N.T. 193-194).

46. Ms. M was responsible for the testing permission form (S-11) which would allow for the administration of the TOMAG. She testified that while Father signed the paper and indicated that the process should get started, Ms. M did not realize that he had not checked the approval block. She intended to do the testing the next day but she learned that Student was not feeling well. (N.T. 197). Ms. M expressed her opinion that she would want to see current academic levels for Student as well as information about his emotional/social development. (N.T. 202-203).

47. Ms. K is Student's current regular education teacher. Student is one of 25 students in a self-contained fifth grade classroom. She holds a dual certification in early childhood and elementary education with a Master's Degree in instructional leadership. She has four years of experience teaching. (N.T. 224-226).

48. Ms. K explained that she implements specialized instruction for gifted students by looking at the IEP and then incorporating the IEP concepts into her lesson plan. (N.T. 226).

49. Student participates in a "24 Club" which is an extracurricular math activity. She helped with this club last year. (N.T. 227). Student is pulled out of Ms. K's classroom for an hour and 45 minutes a week for "resource" and half hour for band. Flex time occurs in her classroom where students are grouped for activities in language arts and social studies. (N.T. 234-236).

50. Ms. K testified that Student has been "very successful" in her classroom and has been "actively involved." She does not believe that Student is bored with the curriculum. (N.T. 238).

51. Ms. K testified credibly that she has observed Student and "Bully" in her classroom and has not seen much interaction between the two of them. She has not observed any activities which would be considered bullying. (N.T. 240).



52. Ms. K testified that at the January 25, 2006 GIEP meeting, Exhibit S-9 was not in existence. Only the November, 2005 GIEP, Exhibit S-6, was in existence. She did not have S-6 with her at the meeting. (N.T. 250-251).

53. According to Ms. K, because Parents had never signed off on the November, 2005 GIEP, the school is still implementing the 2004 GIEP. (N.T. 251).

54. During the January 2006 meeting, no one proposed any changes in the goals and objectives. (N.T. 252).

55. Student does not take math in her classroom, but Student does have math with “Bully”. (N.T. 255). Student takes the same tests and uses the same textbook in science as the other fifth grade students. Ms. K stated that Student works at the pace of the other students in Student’s group. (N.T. 255).

56. Neither the word “science” nor “social studies” appear in any of the annual goals or short-term learning outcomes. (N.T. 258).

57. Ms. K had not recommended any additional testing and did not see the need for testing to determine whether or not Student should be grade-skipped. (N.T. 263-264).

58. Ms. K uses basically the same process with all of her students, but she stated that it is different for Student because she knows what Student can do and she pushes Student a little further. (N.T. 270). Ms. K is of the opinion that there are no concerns regarding Student’s developing and refining creativity or research skills. (N.T. 273).

59. Ms. G is the building reading specialist. She has a Bachelor of Science from Millersville University, is a certified reading specialist K through 12, has her Master’s equivalency for the State of Pennsylvania and has an Instructional 2 permanent certification in grades K through 8. She has been at her present building for 28 years. (N.T. 289-290).

60. Ms. G testified concerning reading enrichment programs that are available school-wide such as Reading Olympics, which includes books on the eighth and ninth grade level, and Young Author’s Conference. There is no specific mention of these things in Student’s GIEP. (N.T. 293-294; 308, see S-6, S-9).

61. If Student were reevaluated, Ms. G would administer the Burns and Roe to determine instructional levels. (N.T. 301). She has not tested Student since the first grade. (N.T. 303).

62. She has never had a child advanced or grade skipped in reading in the 28 years she has spent at Student’s building. (N.T. 305). Ms. G is unaware of any Parent filing a due process hearing request on the issue of grade skipping. (N.T. 320).

63. Ms. G did not participate in the creation of a GIEP for Student. (N.T. 309).
64. Ms. W is a teacher of the gifted at two buildings in the School District, including the one where Student attends. She has a Bachelor of Science degree in elementary education and is working on her Master's of Science in educational development and strategies. She is working on her Elementary Level 2 certificate. She has worked with Student in the fourth and fifth grades. (N.T. 322-324). Ms. W conducts programs for gifted students in her resource room consisting of seminar (teacher directed) adapt (more student led) and literature groups (working with a group of students over lunch). (N.T. 325-326). The Students may all be working on the same project, but there is a different focus for each child depending on what the child's IEP states. (N.T. 329).
65. Student attended her resource room three times per week for 30 to 35 minutes each time during the 2004-2005 (fourth grade) school year. (N.T. 329-330). In the fifth grade, Student spends the same three times per week plus an additional 15 minutes in the morning and twice a week for a math class. Student may come at lunchtime for one meeting of a literature group every other week. (N.T. 330-331).
66. According to Ms. W, the regular education teacher is "expected to be knowledgeable of the IEP and to be following it and providing extra enrichment in their classroom." (N.T. 343).
67. Ms. W did observe some butting of heads between Student and "Bully", but she described it as "nothing that was very alarming." (N.T. 346).
68. When asked to explain why the program modifications in the proposed GIEP were the same as the program modifications from the previous GIEP, Ms. W stated that they "worked" and that they should simply continue them. (N.T. 355-356).
69. Ms. W confirmed that the program implemented for Student currently is the November, 2004 IEP. (N.T. 362).
70. No final GIEP resulted from the January 25, 2006 meeting because the Parents did not approve. (N.T. 363-364).
71. Ms. W conceded that the GIEP provides for working on an independent project but that project is neither described in the GIEP nor can one tell exactly what will be achieved at the end of the project. (N.T. 374).
72. Only Student does the 15-minute period twice a week in the morning with Ms. W, but this is not included in the written GIEP. (N.T. 376-377).
73. Ms. W was uncertain about the number of times she has met with Student's regular classroom teacher. The Hearing Officer finds that the interchange between the teacher of gifted and the regular classroom teacher is below acceptable standards. (N.T. 3778-379).

74. The total interaction Student has with sixth graders is about 30 minutes every two weeks doing the literature lunch. (N.T. 382). There is only one girl in the gifted program in sixth grade. Hence Student works with six other boys and one girl. (N.T. 383).

75. Ms. W expressed concern about how Student can work with the sixth grade gifted students because of scheduling difficulties. Sixth graders work in the resource room at the end of the day when Student has specials, social studies, or science. (N.T. 391).

76. When specifically asked by the Hearing Officer whether Student had met any of his IEP goals contained in S-2, Ms. W conceded that one could not tell. (N.T. 403-404).

77. The teacher of gifted could not adequately explain how the GIEP goals applied specifically to Student and how one could determine when the goals had been met. (*See, e.g.* N.T. 405-411).

78. Mr. D is the administrator of the gifted support program in the School District and has held this position since January, 2006. (N.T. 415). He has met Student only one time. (N.T. 417).

79. According to Mr. D, advancement in any subject area would be based on “need.” He had specific knowledge of two individuals who were advanced full grades or in subject areas other than math. (N.T. 422-423). He has never seen Student in the classroom setting and played no role in the preparation of Student’s GIEPs. (N.T. 426).

80. Mr. D distinguishes between a policy which comes from the School Board and a procedure which is administrative. The acceleration for mathematics is considered a “procedure.” (N.T. 426-427).

81. Mother testified that Student is, in her observation, advanced in the areas of music, verbal communication, mathematics, and science. (N.T. 469-472).

82. Before the start of the 2005-2006 school year, Student came to Student’s Mother and was upset that “Bully”, who had bothered Student in third grade, would be in Student’s fifth grade class. (N.T. 494-495). Parents had taken Student to Student’s pediatrician to evaluate physical manifestations of stress in the third grade. (N.T. 495-496).

83. During the 2005-2006 school year Student has complained that Student hates language arts and that Student doesn’t like school. (N.T. 505).

84. Mother testified that during the November, 2005 GIEP meeting she and her husband began to question why the documents were the same from year to year. She was not certain that anything could be done to change them. She testified that she thought she was only entitled to make suggestions about the pull-out periods. (N.T. 513-514).

85. Mother testified that she does not really understand what the goals are and that there were no discussions or explanations for these goals during the GIEP meeting. (N.T. 516-517).

86. Mother sat in on Student's pull-out class during American Education Week. She observed that Student and "Bully" had words and that "Bully" did not react to other children in the class as s/he did to Student. (N.T. 522-523).

87. Mother testified that she understood the request contained in Exhibit S-10 was designed to allow the School District to test for psychological stressors. She did not understand it to include other evaluations or tests. (N.T. 537-538; 597-598).

88. Mother testified that her husband believed that he had given permission for the TOMAG test and did not realize that there was something wrong with the form until later. (N.T. 540). Mother wanted School District to incorporate their written proposals (S-5) into the GIEP. She testified that a revised draft had some wording changes but did not either incorporate nor comment on their requests for acceleration. (N.T. 540-541).

89. Mother believed that she would get permission slips for additional testing and that she would agree to the TOMAG at the same time. (N.T. 600-601).

90. Mother explained that she was confused by the permission slip because it appeared to give permission for evaluation to enter a gifted program which he was already in. She did not know if this was a "trick." No revisions or clarifications to the permission forms were ever made. (N.T. 550-552).

91. Mother seeks immediate acceleration by a full grade and does not believe that further testing is necessary. She has never heard any complaints about Student's maturity or behavioral issues. He is only weeks younger than those individuals in the sixth grade. (N.T. 566-568).

## CONCLUSIONS OF LAW

1. This case is governed by the state regulations pertaining to gifted education. 22 Pa. Code Chapter 16 [hereinafter Chapter 16]. Neither The Individuals With Disabilities Education Improvement Act of 2004 [IDEA 2004], 20 U.S.C. §1415 *et seq.*, nor its predecessor [IDEA 1997] apply to this case.

2. Because the applicable law is state, rather than federal, the Hearing Officer is bound by the legal interpretation rendered by the Commonwealth Court in *Montour School District v. S.T.*, 805 A.2d 29 (Pa. Commonwealth Ct. 2002), *appeal denied*, 820 A.2d 163 (Pa. 2003).

3. Based upon the *Montour* 1-year limitations period, this case is timely filed and the Hearing Officer has jurisdiction to hear these matters.

4. The School District has failed to comply with its obligations under Chapter 16.

5. In violation of 22 Pa. Code §16.41(b), the School District has failed to provide “appropriate specially designed instruction based on the student’s need and ability” and has failed to ensure that Student benefits “meaningfully from the rate, level and manner of instruction.”

6. Student was denied appropriate specially designed instruction to enable him to benefit meaningfully during the second half of the fourth grade year and the entire fifth grade year.

7. Student is entitled to an equitable remedy for violations of Chapter 16, including compensatory education for one year prior to the filing of the due process hearing request based upon *Montour School District v. S.T.*, 805 A.2d 29 (Pa. Commonwealth Ct. 2002), *appeal denied*, 820 A.2d 163 (Pa. 2003).

8. Parents have shown no mitigating circumstances which would entitle them to additional compensatory education.

## DISCUSSION OF ISSUES

### **1. Have Parents filed their claim within the applicable statute of limitations?**

Before this Hearing Officer may assume jurisdiction over these claims, an analysis of the appropriate statute of limitations is required. The relevant statutory and regulatory provisions are different for gifted education as opposed to those applicable to students with disabilities. The Commonwealth of Pennsylvania has chosen to provide educational services to gifted children and relevant state case law has established a one-year statute of limitations. *See Montour School District v. S.T.*, 805 A.2d 29 (Pa. Commonwealth Ct. 2002), *appeal denied*, 820 A.2d 163 (Pa. 2003).

The due process hearing request was filed with the Office of Dispute Resolution on

February 13, 2006. Parents raise issues regarding the November 2005 and January 2006 GIEP's. Parents have filed their claim within one year of the GIEP's at issue and this Hearing Officer concludes that the claim has been timely brought<sup>2</sup> and that she had jurisdiction.

**2. Did the School District provide Student with appropriately designed instruction based on the Student's needs and ability during the fourth and fifth grade years?**

The GIEP in place for Student's entire fifth grade year and approximately half of the fourth grade year was the last approved GIEP dated November 2004 (S-2). (N.T. 362). It consists of all of the relevant parts provided in Chapter 16, 22 Pa. Code §16.32(e), but it fails to provide any objective criteria for determining whether the goals and learning outcomes are being achieved.

The Present Education Levels provided only report card grades but no indication, for example, of whether Student is reading at a fourth, fifth, or sixth grade level. It indicates report card grades as follows: Reading: strongly in place; Math: A; Science/Health: A; Social Studies: A; Written Expression: Advanced; Rate of Acquisition: High; and Rate of Retention: High. (S-2, pgs. 2-4; N.T. 61-62). These are hardly baselines upon which measurable goals can be based. Moreover, it appears that these have never been changed in subsequent GIEP's. (See S-6 and S-9).

Annual goals were described in this GIEP as follows: 1. To help the student monitor his educational progress effectively; 2. To help the student to develop and refine communication skills; 3. To develop and refine research skills; 4. To develop and refine higher level thinking skills; 5. To develop and refine creativity. Very general short term learning outcomes were

---

<sup>2</sup> Whether a claim has been timely brought is distinct from the period of time for which a remedy may be given.

provided under each annual goal. The Hearing Officer believes that these goals are neither individualized nor capable of being achieved. When a goal is written: “To help the student,” this sounds more like an appropriate goal for a teacher. One might be able to assess whether or not the teacher helped the student but it says very little about where the student is headed and how achievement will be determined. Chapter 16 states that each GIEP must contain “objective criteria, assessment procedures and timelines for determining, on at least an annual basis, whether the goals and learning outcomes are being achieved.” 22 Pa. Code §16.32(e)(5). When specifically asked by the Hearing Officer whether Student had met any of his IEP goals contained in S-2, Ms. W conceded that one could not tell. (N.T. 403-404). These goals do not begin to meet the Chapter 16 requirements.

According to the GIEP, assessments were to be done through teacher observation and reviews. Again, these statements are so vague and subjective that they appear worthless. The Student’s needs were described very generally as: challenges in all academic areas, opportunities to practice multi-step math problems, and science opportunities. Every child in public school would need “challenges in all academic areas.” This statement says nothing about what this particular student needs.

The specially designed instruction included regular seminar and Adapt Time, in-class enrichment, independent projects, group discussion, and computer activities among other things. While these may be a good general outline, they hardly seem descriptive of anything individualized or “special.”

Applying the criteria in Chapter 16 and Department of Education’s “Gifted Guidelines dated 2004 (P-21, pg. 33), the only GIEP in place for this Student is simply inadequate. The proposed revisions are not improvements. Present levels of educational performance should be

updated annually but they were not. The goals and outcomes should be child-specific and measurable but they are not.

For all of these reasons, in violation of 22 Pa. Code §16.41(b), the School District has failed to provide “appropriate specially designed instruction based on the student’s need and ability” and has failed to ensure that Student benefits “meaningfully from the rate, level and manner of instruction.” Student was denied appropriate specially designed instruction to enable him to benefit meaningfully during the second half of the fourth grade year and the entire fifth grade year.

**3. Did the conduct of “Bully”, a fellow student, interfere with the School District’s ability to provide an appropriate specially designed instruction based on the Student’s needs and ability?**

The Hearing Officer heard conflicting testimony regarding the relationship between Student and “Bully”, a fellow fifth grade student. The School District has procedures in place for determining whether or not bullying or harassment has occurred. (P-7). While it appears that the School District may not have taken Parents’ complaint as seriously as may be expected, the Hearing Officer need not decide this issue in view of the decision regarding the appropriateness of the designed instruction. Having determined that the GIEP’s in issue were woefully deficient, there is no greater remedy which could be afforded Student even if the bullying were to be proven to the satisfaction of this Hearing Officer.

In the event that the GIEP for the 2006-2007 school year requires continued association between Student and “Bully”, the School District is directed to investigate any complaints by Student or Student’s Parents in a timely fashion. A School District official independent of those who were involved in the prior process should be used to make this determination so that there



can be no appearance of pre-determination of the issues.

**4. Is a reevaluation necessary for purposes of determining acceleration (grade-skipping)?**

Student has not been formally evaluated in excess of four years. It appears to this Hearing Officer, in reliance on the opinions of the School District witnesses, that a reevaluation is indeed necessary before reaching any conclusion of grade skipping. It should certainly be done to ensure that Student is offered the enrichment he appears to need and deserve pursuant to Chapter 16. Consequently, an immediate comprehensive reevaluation will be ordered to be completed before the close of this school year.

The Hearing Officer is not impressed with the apparent reluctance of the School District to accelerate any student, even in the area of mathematics where it has a written procedure. Chapter 16 specifically provides for acceleration and opportunities to “go beyond the program that the student would receive as part of the general education.” 22 Pa. Code §16.41(b)(3). The School District seems only too willing to resist efforts to accelerate based upon misplaced notions of scheduling difficulties and administrative inconvenience.

Although the School District may complain that the timeline imposed by the Hearing Officer is exceedingly short, the School District caused the delay by failing to prepare a proper permission to evaluate. It would be tragic to delay further the possibility of grade skipping for this Student who may be bored with his educational program and who has clearly suffered from the School District’s failures to comply with Chapter 16. Consequently, the reevaluation process must be completed before the end of the current school year.

**5. Are Parents entitled to equitable remedies for violations of Chapter 16? If so, what remedies?**

This Hearing Officer is bound in all respects by the provisions of state law and regulations contained in Chapter 16. Regrettably, Chapter 16 provides no guidance whatever with respect to remedies available when students are denied the required specially designed instruction pursuant to this Chapter.

Chapter 16 does not specifically use the term “free appropriate public education” (FAPE), but some courts have deemed that FAPE’s applicability is inferable in terms of the basis for compensatory education, which the courts have treated as applicable to gifted students. *See, e.g., Carlynton School District v. D.S.*, 815 A.2d 666 (Pa. Commonwealth Ct. 2003); *Saucon Valley School District v. Robert O.*, 785 A.2d 1069 (Pa. Commonwealth Ct. 2001). The Commonwealth Court in *Brownsville Area School District v. Student X*, 729 A.2d 198 (Pa. Commonwealth Ct. 1999) held that compensatory education is an appropriate remedy for gifted children when a district fails to provide an adequate program. Accordingly, in the absence of statutory or regulatory delineation of the range of remedies available, the Panel in that case was deemed to have the authority to order certain remedies for gifted students.

It seems unnecessary to utilize the concept of FAPE when Chapter 16 itself provides that the School District is obligated to provide “appropriate specially designed instruction based on the student’s need and ability” and to “ensure that the student is able to benefit meaningfully from the rate, level and manner of instruction.” 22 Pa. Code §16.41(b)(1)(2). This language is mandatory and appears to this Hearing Officer to be equivalent to concepts of FAPE.

As described above, the School District has failed significantly in meeting these regulatory requirements. Consequently, the issue is what remedy may be awarded for violations

of Chapter 16.

Because our courts have agreed that as an equitable remedy compensatory education may be awarded for violations of Chapter 16, those parameters on compensatory education commonly applicable to IDEA 1997 and IDEA 2004 will be applied here. Whether or not there exist any limitations on the amount of relief in the nature of compensatory education has also been addressed by the court in *Montour School District v. S.T.*, 805 A.2d 29 (Pa. Commonwealth Ct. 2002), *appeal denied*, 820 A.2d 163 (Pa. 2003). Not only did that case address the issue of statute of limitations, but it also held that an award of more than one year of compensatory education was precluded unless some mitigating circumstances would excuse the delay. *Montour School District*, 805 A.2d at 40. No mitigating circumstances have been proffered by the Parents.

Typically, the School District is given time to remedy any substantive or procedural deficiency before a compensatory education award begins. The facts establish here that at the beginning of the fourth grade year, the School District had sufficient reason based on the very high test scores in the third grade in reading and mathematics to believe that Student should be reevaluated to determine the appropriateness of continued placement with Student's chronological peers in all subjects. At that time, a reevaluation should have been triggered. Chapter 16 provides that an evaluation is to be done within 45 school days of parental permission, 22 Pa. Code §16.22(j)(1), that an evaluation report be completed within 10 school days thereafter, 22 Pa. Code §16.22(j)(2), and delivered to the parents within 5 school days after completion, 22 Pa. Code §16.22(j)(3). This process would encompass not longer than sixty

school days. Granting the School District another 30 school days<sup>3</sup> to have an acceptable GIEP in place, approximately half of the fourth grade year could have been required to rectify the problems. Consequently, any compensatory education award will begin only after granting reasonable time for the School District to perform a reevaluation and put an acceptable GIEP in place. Because of the one-year limitation on the award of compensatory education, the remedy will begin February 13, 2005 which should be close to the time the School District should have remedied the lack of a necessary re-evaluation.

The Hearing Officer is not persuaded that the Parents interfered with the evaluation process when they refused to sign the permission form. They attempted to agree to the TOMAG (S-11) by signing the form but simply failed to check the block. (N.T. 540). The School District admits that the permission to evaluate repeatedly presented to the Parents erroneously stated that the tests and procedures would be used to “assess *eligibility* for the Gifted Program” (emphasis added). (S-10, pg. 1; N.T. 110-111, 132, 143). Because the relationship with the School District had deteriorated by that time and the Parents could not understand the need for a battery of psychological as opposed to intelligence testing, it is understandable that the Parents thought that they were being “tricked.” (N.T. 551). Had the School District properly prepared a written permission to reevaluate and clearly spelled out the tests that they wanted to administer and why, the delays might have been held against the parents. However, there is no reason to believe that Parents of Student, no matter how well educated and sophisticated they may be, should be deemed to have “frustrated” the evaluation process when it was the School District who confused the Parents with their improperly and incompletely written permission form. For these reasons,

---

<sup>3</sup> A GIEP shall be developed within 30 *calendar* days after issuance of a GMDT’s written report. 22 Pa. Code §16.32(g)(1). The Hearing Officer will err on the side of granting 30 *school* days for this development.

the Hearing Officer declines to accept the School District's argument that Parents have caused the delay in the evaluation and should forfeit some or all of their remedy on equitable grounds.

An equally interesting legal issue to be decided is the nature and scope of any compensatory educational services awarded. In *Brownsville Area School District, supra.* the Court determined that "as applied to the gifted child, compensatory education is limited to education available within the curriculum of the school district" citing *Centennial School District v. Department of Education*, 517 Pa. 540, 539 A.2d 785 (1988). *Brownsville*, 729 A.2d at 200. The Hearing Officer will accept this statement as good law, but there appears on this record to be no good reason why enrichment for Student cannot be provided within the existing curriculum if some flexibility and creativity are used. Administrative or scheduling inconvenience is not a reasonable excuse for refusing to offer opportunities to accelerate should the need be established. Three hours per day of compensatory education is awarded for the three major subject areas of reading, language, and mathematics.

The Parents should be entitled to make initial decisions about the form and nature of the compensatory educational services. This is particularly reasonable where the School District has so miserably failed in its obligations as set forth in Chapter 16. However, having said that, the Parents are cautioned that they are to coordinate with the GIEP Team with respect to these compensatory services.<sup>4</sup>

Chapter 16 provides specific procedures for the mediation of any disagreements. If the Parents cannot persuade the GEIP Team of the usefulness of their choices, the parties may utilize

---

<sup>4</sup> At least one Special Education Appeals Panel believes that the choice, method, and nature of the compensatory educational services should be the decision of the GIEP team, not the parent. *See In Re: The Educational Assignment of Jasmyn P.*, Special Education Appeal Number 1536. Yet, even this Panel would insist that

the procedures for mediation set forth at 22 Pa. Code §16.64.

---

compensatory education services be “in addition to” the Student’s GIEP and that they fit within the Student’s individual needs and abilities.

## ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby ORDERED that:

1. The School District shall complete a gifted multi-disciplinary evaluation of Student, including an evaluation report, within fifteen (15) school days of the date of this Order or at least ten (10) days before the last day of the 2005-2006 school year, whichever is sooner. The evaluation report will be shared with the Parents within two (2) school days of its completion.

2. Not later than the last day of the 2005-2006 school year, the School District shall convene a Gifted Multidisciplinary Team (GMDT) to consider and determine whether or not Student should be accelerated during the 2006-2007 School Year. If the determination is to recommend acceleration, the School District shall take all steps necessary to implement this decision at the start of the 2006-2007 School Year.

3. The School District is directed to prepare a GIEP for Student which complies in all respects with the requirements of Chapter 16 not later than the tenth school day of the 2006-2007 School Year.

4. In the event that the GIEP for the 2006-2007 school year requires continued association between Student and "Bully", the School District is directed to investigate any complaints by Student or Student's Parents in a timely fashion. A School District official independent of those who were involved in the prior investigative process should be utilized to make this determination.

5. The School District shall provide compensatory education services equaling three (3) hours per day for those days Student actually attended school since February 13, 2005 and for every day of attendance until a GIEP complying with Chapter 16 is in place. The School District shall provide Parents with a written accounting of the calculation of the hours of compensatory education due. Parents may make the initial selection of the form of the compensatory education so long as it represents any appropriate enriching instruction that furthers the goals of Student's 2006-2007 GIEP or future GIEP's and is within the curriculum of the School District. Should the GIEP Team be unable to agree with the Parents' selection, the parties are directed to engage in good faith efforts to resolve their differences or to utilize the mediation procedures set forth in 22 Pa. Code §16.64. Any compensatory education services in compliance with this Order must be in addition to Student's then current GIEP and may not be used to supplant recommended GIEP services.

Date: May 4, 2006

---

Debra K. Wallet, Esq.  
Hearing Officer  
24 North 32<sup>nd</sup> Street  
Camp Hill, PA 17011  
(717) 737-1300