

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

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.

DECISION

Child's Name: D. S.

Date of Birth: [redacted]

Dates of Hearing: March 27 and 28, 2013

OPEN HEARING

ODR No. 13570 / 12-13 KE

Parties to the Hearing:

Representative:

Parents

Pro Se

Carbondale Area School District
101 Brookland Street
Carbondale, PA 18407-2207

Ms. Heather Matejik, Esq.
1301 Masons Mill Business Park
1800 Byberry Road
Huntingdon Valley, PA 19006

Date Record Closed:

April 9, 2013

Date of Decision:

April 12, 2013

Hearing Officer:

Shawn D. Lochinger, Esq.

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INTRODUCTION AND PROCEDURAL HISTORY

Student resides in the Carbondale Area School District (the “District”), and has been identified as gifted under the provisions of 22 Pa. Code §§ 16.1 – 16.65. Parents claim that the District has denied the Student an appropriate gifted education in that the District did not offer an appropriate gifted education plan while the Student was enrolled at the District. The Parents request compensatory education for the maximum length of time possible given the alleged inappropriateness of the program.

ISSUES

- 1) Has the District provided an appropriate gifted education program to the Student from February 12, 2012 through February 11, 2013 (the final day Student attended classes at the District)?

- 2) If not, should compensatory education be awarded in this matter?

FINDINGS OF FACT

- 1) Student was enrolled in the District through February 11, 2013 and was designated as a gifted student under the terms of 22 Pa. Code §§16.1-16.65 (School District Exhibit (“SD”) 7, p. 12).

- 2) Student was first evaluated for giftedness on February 22, 2007 at the request of the Student’s Parents. The evaluation resulted in a Gifted Written Report (“GWR”) dated “February 29, 2007” (sic) (SD 10).

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- 3) The February 2007 GWR found Student to have a full scale IQ below the District's screening threshold. Based upon this and other factors, the Student was found *not* eligible for gifted services (SD 10).
- 4) At the request of the Parents, Student was again evaluated for giftedness on October 18, 2007. A GWR dated October 22, 2007 found the Student to have a full scale IQ below the District's screening threshold and, once again, found that based upon the IQ score and other factors, the Student was *not* eligible for gifted education services (SD 9).
- 5) A little more than a year later, Parents requested Student to be evaluated once again. An evaluation was completed on November 20, 2008 and a GWR dated December 8, 2008 found the Student to have a full scale IQ that was again below the District's screening threshold. Once again, based upon a number of factors, the District found the Student was *not* eligible for gifted education services (SD 8).
- 6) Finally, Parent requested a fourth evaluation several months into the 2011/2012 school year. An evaluation occurred and a GWR dated November 23, 2011 was produced (SD 7). Student was credited with a full scale IQ *above* the District's screening threshold on the November 2011 GWR and was found to be *eligible* for gifted education services (SD 7).
- 7) Following the GWR, an invitation to participate in a GIEP team meeting was sent to the Parents on December 19, 2011 for a meeting to take place on January 6, 2012 (SD 5).
- 8) This was followed by a Notice of Recommended Assignment ("NORA") which placed the Student in the gifted program (SD 6). The NORA was signed by both Parents on January 6, 2012 (SD 6 and Notes of Testimony ("NT") 154 and 256).

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- 9) Also on January 6, 2012, a Gifted Individual Education Plan (“GIEP”) was issued by the District with an implementation date of January 11, 2012 (SD 3). Student’s age and grade were incorrectly set forth on the copy of the GIEP that was placed into the record in this matter. The incorrect age and grade may have been put into the document at a later date (SD 3 and NT 220 – 222). However, the incorrect age/grade is not a material issue in this matter.
- 10) The GIEP was written based upon the analysis contained in the GWR (NT 105 and 124). The GWR reported that the Student “exhibits a significant degree of need, which would require specially designed instruction that can be provided by gifted education services” (SD 7, p. 11).
- 11) The District recommended, in the GWR, the following five items for the Student’s GIEP:
 - 1) enrichment activities that challenge the Student’s advanced abilities, 2) work at a faster rate; 3) additional instruction time and the use of advanced or enhanced instructional materials; 4) opportunities to pursue areas of interest; and 5) placement in the gifted program to help meet the Student’s needs. (SD 7, p. 12).
- 12) The District Psychologist who drafted the GWR admitted that the recommendations contained in the GWR were taken from a “general list of recommendations” (NT 74).
- 13) Following the completion of the GWR, the District set up a meeting to develop the GIEP (NT 111). The meeting was attended by the Student’s 2011/2012 gifted teacher and the Student’s Parents. During this meeting, the District’s gifted teacher explained that the Student was permitted to choose one “theme” which was to be used as the central focus of the Student’s GIEP (NT 116 and 117). Other than the gifted teacher, no school personnel were present at the meeting (NT 101).

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- 14) The parties agree that there was no discussion of specific goals at the GIEP meeting and that the goals were written without specific Parental input (except on the overall choice of a theme) (NT 147, 218, and 219).

- 15) Following the meeting and the choice of a theme (genetics and DNA), the gifted teacher prepared the Student's GIEP (NT 97, 114, 124, and 125). The GIEP focused on the theme chosen at the GIEP meeting (SD 3). The developed GIEP contained just one annual goal: "Through reading, research and hands on activities, [Student] will demonstrate enhanced understanding of the vocabulary and basic concepts of human genetics" (SD 3, p. 3)

- 16) The gifted teacher testified that the GIEP was sent home with the Student (NT 147 and 148). The Parents contend that the GIEP was not received by the Parents during the 2011/2012 school year (NT 219).

- 17) The genetics and DNA theme was chosen after a list of themes was offered to the Student by the gifted teacher (NT 116 and 257). While there were a finite number of offered themes, the list was not intended to be exclusive, as is evidenced by the fact that the Student in this case chose a theme that was not on the list (NT 114 – 117 and 257).

- 18) Student's gifted education program consisted, in the main part, of being pulled out of class for 40 minutes, one time per week, for the 2011/2012 school year (NT 100 and 113). While in the pull-out classroom, the Student was paired with one other student and was instructed and given homework assignments by the gifted teacher (NT 114). The other student present in the gifted classroom *did not* have the same theme as the Student in this case (NT 114).

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- 19) While there was no specific curriculum for the gifted education class, the instructor pulled resources from a variety of sources and materials that were available in her classroom and on the internet (NT 136, 137, 141, and 142).
- 20) The Student was also eligible to participate in a gifted education field trip. During the 2011/2012 school year, Student attended a field trip where the group visited both a farm and a food distribution center (NT 135).
- 21) Student also participated in the District's Gifted Night of Sharing in 2011/2012. At this event, the Student presented a genetics/DNA based demonstration and spoke to other students and parents concerning the Student's genetics/DNA project (NT 105, 106, and 134).
- 22) During the 2011/2012 school year, Student was also given the opportunity to do extra work in reading and math through the presentation of advanced worksheets in class. It is not completely clear what grade level the extra materials were written on, although the teacher testified that she was sure the materials were at a "higher" grade level than Student's normal work (NT 162, 165, 166, and 172).
- 23) The regular classroom teacher also gave Student the opportunity to do extra lessons and activities during the 2011/2012 school year. The teacher testified that extra work was occasionally given to "higher level" students, including the Student in this case. The extra work consisted of packets of eight to nine pages on various subjects (NT 167 and 168).
- 24) The Student's regular education teacher for 2011/2012 also testified that Student had to complete a morning journal that focused mainly on math and reading issues. The morning journal was individually designed for each student, including the Student in this matter (NT 161 and 169 – 173).

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- 25) In math, the Student was permitted to do extra homework above the Student's grade level if the Student finished work early in class during the 2011/2012 school year. The teacher admitted that this option was offered to all students, and not just to the Student in this matter (NT 161 and 171).
- 26) Student also participated in a reading intervention class in 2011/2012 that allowed the Student to do extra and enhanced reading work (NT 173 – 175).
- 27) Student was also permitted to do a social studies research project in 2011/2012, although the project was open and offered to all students in the classroom (NT 175).
- 28) Parents did not complain to anybody in the District concerning the Student's gifted program during the 2011/2012 school year. There is no evidence to indicate that, at the time, the Parents believed the program to be inappropriate (NT 77, 119, 120, and 178).¹
- 29) For the 2012/2013 school year, the Student changed buildings within the District and was assigned to a different gifted instructor (NT 189, 270, and 282).
- 30) For the 2012/2013 school year, no new GIEP was developed despite the fact that the Student moved into a different school building. The single goal in the Student's GIEP remained unchanged (SD 3, p. 3 and NT 283 – 285).
- 31) Student received no specific gifted pull-out program for the 2012/2013 school year (NT 304).

¹ Parents now claim that they were simply unaware of gifted education plans and the regulations surrounding them at the time (NT 214, 226, 227, and 232). While this testimony is credible, the only point being made here is that there is no evidence that the Student or the Student's Parents expressed a need or desire for the Student to do *more* during the 2011/2012 school year. It was only when the instant action was filed that the Parents first appeared to have an issue with the 2011/2012 school year.

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- 32) The District did not update or revise the Student's GIEP for the 2012/2013 school year (NT 221, 285, and 301).
- 33) Despite the fact that the Student's GIEP expired on January 11, 2013, a new GIEP was not developed by the District (NT 301).
- 34) Parent brought the lack of a gifted program to the attention of the District on several occasions during the 2012/2013 school year (NT 214, 215, 217, 221, and 302).
- 35) The District offered the Student several opportunities during the 2012/2013 school year based upon the Student's status as a gifted student (NT 183, 184, 285, and 292).
- 36) The first opportunity that Student was offered during 2012/2013 was the chance to participate in a NASA program run by the local Intermediate Unit ("IU"). While the NASA program was clearly science related, there is no evidence that it was specifically designed to teach about human genetics or DNA (NT 313, 333, and 334).
- 37) Prior to the 2012/2013 school year, the NASA program had been open to all students in the building with an interest in participating in the program. Students were required to write an essay and those with the essays that expressed the best story or most interest in the program were selected for the NASA program. Only four students were eligible for the program in any given year (NT 287, 313, 314, and 316).
- 38) For the 2012/2013 school year, the District changed the eligibility requirements for the NASA program. Specifically, the District declared that only gifted students would be eligible for the program (NT 313, 314, and 324).

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- 39) The Student was invited, with all other gifted students in the building, to write an essay to compete for entry into the NASA program. The Student did not complete the process (NT 316, 324, and 325).
- 40) Student did not complete the essay process because of, at least in part, the death of the Student's great-grandmother (NT 248, 314, and 315).
- 41) In 2012/2013, only four gifted students completed an essay for the NASA program. Thus, all four students were selected for the program's open positions. Student would have been the fifth student if the Student had participated. If the Student had, in fact, participated, one gifted student would *not* have been permitted to enter the program. There is thus no guarantee that the Student would have been a part of the NASA program if the Student had completed the essay (NT 317 and 328).
- 42) The second opportunity offered to the Student by the District was the Pennsylvania Junior Academy of Science ("PJAS") program. The Student participated in this program to a point during the 2012/2013 school year, but dropped out because of other activities that the Student was involved in at the time (NT 288, 289, 294, 295, 305, and 388).
- 43) The PJAS program was not a "gifted only" program, but was open to *all* students in the building which Student attended during the 2012/2013 school year (NT 337, 338, 341, 343, and 345).
- 44) Student was an excellent math student during the 2012/2013 school year (NT 364 and 365). Student's math teacher differentiated instruction in the Student's classroom by allowing selected students to delve deeper into the math concepts and problems presented during class time. While the selected students were not necessarily gifted, Student was one of only several students who was always responsive to this differentiated instruction (NT 364 and 365).

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- 45) Student's math teacher believes that the Student had the ability to move one and one-half grade levels ahead in math (NT 377, 378, and 380).
- 46) After expressing concerns several times concerning what she termed the "lack of a gifted program," Parent came to the Student's building on February 11, 2013. Parent demanded a copy of the GIEP and GWR. Parent was given copies of these documents (NT 215).
- 47) Parent and District officials met and Parent threatened to withdraw Student from the District. The lack of a gifted program was at least a part of these discussions (NT 183, 186, 187, 192, 197, 216, and 217).
- 48) During the meeting, the Principal of the building admitted that acceleration in math was available but would not start until the next school year (NT 199 and 217).
- 49) Parent withdrew Student from the District on February 12, 2013 and enrolled Student in a cyber charter school (Parents' Exhibit ("P") 10, p. 1, SD 1, p. 3, and NT 17 and 187).
- 50) At the cyber charter school, Student is working one grade level above in all subjects except math where Student is working two years above grade level. Student was placed into these class levels due to a "non-standardized and non-proctored" test that was given by the cyber charter school (P 10, p. 1 and NT 238, 240, and 265).

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 upon the unique needs of that student. This education can

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include acceleration and/or enrichment programs and services that are rendered according to the student's intellectual/academic needs and abilities.²

Chapter 16 also provides for certain procedural safeguards as well as an obligation on the part of the school district to identify an appropriate program for students who are gifted and need specially designed instruction beyond that which is provided in the regular education program. 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 major issue to the attention of the Hearing Officer. Specifically, the Parents' Complaint, as well as the agreement of the parties at the start of the hearing, indicated that the main issue in this case was the appropriateness of the Student's GIEP. The Parents brought both specific procedural and substantive issues to the Hearing Officer's attention in this matter. The Parents also argued that should the GIEP be found to be

² 22 Pa. Code § 16.2.

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inappropriate, the Student should be awarded compensatory education for the maximum time allowed by law (here, one full year).

Initially, the Parents have brought several matters to the attention of the Hearing Officer concerning the 2011/2012 school year. First, the Parents argued that the 2011/2012 GIEP was not appropriate for the Student in that it did not take into account the Student's giftedness across all subject areas. The Parents essentially argued that the 2011/2012 gifted program inappropriately "pigeon-holed" the Student into one area by requiring the Student to select one specific theme for the Student to participate in during the Student's gifted pull-out opportunity (science – or more specifically in this case – human genetics and DNA). The Parents argued that the remaining curriculum during the 2011/2012 school year, despite the several "extras" given by the regular classroom teacher, was not individualized and did not rise to the level of a gifted education required by the Student's GIEP and the law.

The District counters this argument by indicating that the 2011/2012 GIEP was, in fact, appropriate. The District argued strenuously that the Student was evaluated four different times just to be initially placed into the gifted program. The District also argued that the Student was gifted (if gifted at all) only in the area of mathematics and not across the board as was argued by the Parents. The District also argued that the gifted program allowed the Student to do accelerated work, was individualized to meet the Student's needs, and allowed the Student to work on more advanced materials through the Student's work on extra projects and with added materials in both the gifted and regular classroom.

Initially, it must be stated that the District spent a substantial amount of time arguing about the Student's inclusion in the gifted program. Such an argument, however, was not proper or relevant in this situation, as the issue of the Student's giftedness was not before the Hearing

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Officer in this case.³ Moreover, while not relevant to the decision in this case, it must be stated that the exact same criteria that the District used to argue that the Student was not technically eligible for the gifted program (or, alternatively, that “barely” got the Student into the gifted program) is the exact same criteria upon which the District issued a NORA clearly stating the Student’s eligibility for its gifted program. I find it inappropriate for the District to argue, even impliedly, that the Student should not have been eligible for the gifted program. In the same vein, it must be noted that the Student’s GWR indicated that the Student “exhibits a significant degree of need, which would require specially designed instruction that can be provided by gifted education services.” This key phrase was written by the District itself. Accordingly, the District cannot now run away from its own statement and argue that the Student was not truly gifted. If the District did not believe that the Student was gifted, it should not have drafted and set forth a GWR indicating that the Student was, in fact, eligible for the gifted program. To state (or at least imply) that the Student should not be seen as gifted was wholly inappropriate.

The Parents argue that there were a number of procedural issues with the Student’s GIEP during the 2011/2012 school year. For example, the goals for the GIEP were written without parental input (other than the Parents expressing the Student’s desire to work on a specific theme). There also appeared to be virtually no regular education teacher involvement with the process, as the gifted teacher who wrote the GIEP admitted that no regular education teacher was present at the GIEP meeting.⁴ There is also at least a question of whether a copy of the GIEP was ever given to the Parents.

Frankly, I must agree with the majority of the Parents’ claims in this regard. Chapter 16 requires that a GIEP team develop the initial GIEP (22 Pa. Code § 16.32(a)). As part of developing the initial GIEP, the regulations require that the Parents (or at least one of the

³ While the District refrained from specifically stating during the hearing that the Student should not be in the gifted program, the District took an inordinate amount of time during the hearing strongly implying that the Student was not technically gifted under the law.

⁴ I am aware that the regular education teacher submitted input via writing, but I was presented with no evidence to indicate that a regular education teacher was directly involved with the GIEP team meeting.

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parents) be a part of the GIEP team (22 Pa. Code §16.32(b)(1)). Here, the evidence leads to the conclusion that the Parents simply being presented a list of themes and choosing one is not what the regulations intended as assisting in “developing” a GIEP as part of the GIEP team. Moreover, the District also violated the regulations by not having a current teacher as a part of the GIEP team (22 Pa. Code §16.32 (b)(4)). As the District failed to follow Chapter 16 regulations, the Student’s GIEP must be seen as being inappropriate. The question of compensatory education is thus open and will be discussed below.

The next issue to be addressed is whether the Student’s substantive program for the 2011/2012 school year was, in fact, appropriate. In this case, I find that the Parents have not carried their burden of proving that the substantive program was inappropriate in 2011/2012. I thus find that Student’s GIEP for the 2011/2012 school year was, in fact, appropriate to meet the Student’s needs.

This is based largely on the fact that the GWR indicated that the Student required the following five items: 1) enrichment activities that challenge the Student’s advanced abilities; 2) work at a faster rate; 3) additional instruction time and the use of advanced or enhanced instructional materials; 4) opportunities to pursue areas of interest; and 5) to be placed in the gifted program to help meet the Student’s needs. These five requirements were supported by the evaluations performed on the Student and accurately reflect the Student’s gifted education needs. Therefore, I will accept these needs as proper for this Student. That being said, the evidence shows that the District did, in fact, meet all five of these specific needs. While the pull-out program alone did not meet these needs, the combination of the pull-out program and the extra and advanced work that the Student was given through the Student’s regular classroom came together to satisfy all five of the specific needs set forth in the Student’s GWR.

Moreover, the law in this context is clear that while a district must present gifted students with an appropriate education, the obligation is not without limits, as “the instruction to be offered need not ‘maximize’ the student’s ability to benefit from an individual program.”

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Centennial School District v. Department of Education, 517 Pa. 540, 539 A.2d 785 (1988). Here, the Student's gifted program for 2011/2012 was not ideal and certainly did not "maximize" the Student's ability to benefit from the GIEP. However, the evidence shows that the District was able to meet all five of the Student's needs during the 2011/2012 school year through the education that was offered to the Student both in the gifted pull-out program and in the Student's additional regular classroom work. While it is true that the specific materials and faster rate of work provided to the Student in the regular education classroom was not offered only to the Student, such work did meet the Student's particular needs (perhaps not purposefully so, but practically so nonetheless). Accordingly, when taken as a whole, the Student's gifted education adequately met the Student's needs for the 2011/2012 school year (from a substantive standpoint).

There are an entire different set of facts and circumstances surrounding the 2012/2013 school year. Despite the fact that the Student changed buildings and was in a different setting, the Student's original GIEP was *not* changed. In fact, the gifted education teacher for the 2012/2013 school year admitted that he was remiss in not revising and changing the GIEP. Also, unlike during the 2011/2012 school year, the Student did *not* receive a specific pull-out program that allowed the Student to work on the Student's specific areas of interest. This immediately calls into question at least two of the five requirements written into the Student's GWR by the District (the opportunity to be placed in a gifted program and the opportunity to pursue areas of interest).

The District initially argues that instead of the pull-out program, the Student was offered an opportunity to participate in the National Junior Academy of Science ("NJAS") program. However, testimony from the NJAS advisor indicated that this program was open to all students across the District and not just to gifted students, and was certainly not specifically designed for the Student in this case. More importantly, the Student did not actually participate in the program (except for attending several preliminary meetings). Part of the reason for this, I find, was that the program was never truly intended to be a part of the Student's gifted program and

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was not directed specifically at the Student or the Student's areas of interest. Instead, it appears as though the District has attempted to claim it as part of the Student's program only after it became clear that the Student was not receiving gifted services and the Student's Parents were complaining about said lack of services.

The District then argues that the Student was also offered the opportunity to participate in the NASA program. This was an opportunity that was open to all gifted students and not a specific part of any program written or set forth for the Student. Again, I do not find the District credible when it argues that the NASA program was intended by the District to be part of the Student's gifted program. Instead, it appears as though the NASA program was only made a part of the Student's program after it became apparent that Student's Parents began complaining that the District was not providing gifted services to the Student during the 2012/2013 school year.

The District also argues that the Student was given enhanced materials and higher rate work in the Student's regular classroom. However, I see no compelling evidence that this work completely met the Student's needs. And, unlike during the 2011/2012 school year, the weight of the evidence leads to the conclusion that the Student's needs in this regard were, in fact, *not* being met by the extra classroom work. In 2011/2012, the Student's extra classroom work was adequate to meet the Student's needs *when combined* with the pull-out program and *when combined* with the Student's 2011/2012 classroom teacher's willingness to provide extra instruction and materials across all subject areas. The evidence presented for 2012/2013 cannot support the same conclusion.

One further issue that must be addressed is the fact that the District allowed the Student's GIEP to lapse and *did not even attempt* to put a new GIEP in place during the 2012/2013 school year. When combined with the 2012/2013 gifted teacher's clear lack of understanding and concern for the Student's situation, this evidence leads to the obvious conclusion that the Student's GIEP for the 2012/2013 school year was not appropriate and that the Student did not

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receive an appropriate gifted education during the Student's time in the District for the 2012/2013 school year.

Therefore, I find two violations by the District in this matter. First, there were procedural violations during the 2011/2012 school year. Second, there were substantive violations, in that the Student did not receive an appropriate gifted education, during the 2012/2013 school year. Thus, the question becomes whether compensatory education is necessary in this matter.

In Pennsylvania, a student is entitled to an amount of compensatory education that is "reasonably calculated to bring [the student] to the position that [the student] would have occupied but for the school district's failure to provide a FAPE." *B.C. v. Penn Manor School District*, 906 A.2d 642 (Pa. Commonwealth 2006). "This may require more compensatory education time than a one-for-one standard would, while in other situations the student may be entitled to little or no compensatory education because [the student] has progressed appropriately despite having been denied a FAPE." *Id.*, at 651.

In this case, the District argues that compensatory education should *not* be awarded because the Student is allegedly working at a higher grade level in all subjects (and two years above grade level in mathematics) at the cyber charter school that the Student now attends. The District argues that the Student's ability to work at these higher levels was gained through the education the Student received at the District. The District therefore argues that the Student is not entitled to any compensatory education given the fact that the Student is already "whole." Parents, of course, disagree and have asked that compensatory education be awarded to the full extent allowed by law.

Initially, I am hard-pressed to find that the procedural violations in 2011/2012 had any actual impact on the Student's gifted education during that year. There is truly no evidence that would suggest that the Student's GIEP would have developed differently, even with full participation. This is largely thanks to the work of the Student's gifted teacher during the 2011/2012 school year. That teacher, who I found to be a very credible witness, was very

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

convincing while discussing her compilation of the GIEP for 2011/2012. While full parental and teacher involvement at a GIEP team meeting may have helped fine tune several matters and certainly would have forced the District to be a bit more purposeful in fulfilling its obligations to the Student, I find that it would not have ultimately put the Student in a different situation than that actually experienced by the Student during the 2011/2012 school year. As such, there will be no award of compensatory education for the time in 2011/2012 that the Student was in the gifted program.

The 2012/2013 school year is, however, a different situation. The District's utter disregard of the Student's changed circumstances and its continuous ability to ignore Parental concerns about the lack of gifted services clearly put the Student in a lesser position than the Student would have been in had the District provided an appropriate gifted education. It is appalling that from the beginning of the school year through the middle of February, the District made no attempt whatsoever to revise the Student's outdated GIEP or to even implement the old GIEP. In fact, the gifted teacher for 2012/2013 (who was different than the previous year's teacher) testified that he "talked with kids" during his "gifted duty" time (NT 304) instead of working to correct these failings. Clearly, the Student was damaged by such blatant disregard of the GIEP.

The District's argument against compensatory education, stated above, is that the Student was working at a high rate at the cyber charter school, thus proving that the District's program properly educated the Student. However, the "fact" (which is dubious considering the lack of solid evidence to support it) that the Student is supposedly working at a higher grade level at the Student's new charter school is immaterial to this matter. That is because the District is simply not in a position to take any credit for the Student's "high" standing in the cyber charter school. Instead, the clear implication of the District's failure is that the Student has clearly missed out on educational opportunities that would have met the Student's needs and thus lifted the Student to a higher position than the Student now occupies at the cyber charter school. Accordingly, I believe an award of compensatory education is not only proper, but is necessary in this matter.

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

Given the findings earlier in this Decision, it is appropriate to award the Student compensatory education in the amount of sixty minutes per week for each and every week of the 2012/2013 school year, up to and including February 11, 2013.⁵ I am awarding this amount of compensatory education due to the fact that the Student's program for the 2011/2012 school year, which included a forty minute pull-out per week, was appropriate. I also find that the Student should be awarded twenty minutes per week for working on advanced matters in the Student's regular classroom. Providing the Student with sixty minutes per week for the 2012/2013 school year is an appropriate remedy to bring the Student back to where the Student could have and should have been had the District provided an appropriate gifted program for the 2012/2013 school year.

ORDER

In accordance with the findings of fact and conclusions of law set forth above, it is hereby ORDERED that the District provide the Student in this matter with compensatory education in the amount of sixty minutes for each week of the 2012/2013 school year that the District was in session from the start of school through and including February 11, 2013.

Shawn D. Lochinger
HEARING OFFICER

Date of Decision: April 12, 2013

⁵ I realize that the 2012/2013 school year consisted of a six-day cycle, instead of the "regular" five-day week that existed in 2011/2012. However, the District should not benefit from this change due to the fact that no attempt was made to modify or revise the Student's GIEP for 2012/2013.