

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

Pennsylvania

Special Education Hearing Officer

FINAL DECISION AND ORDER

Student's Name: I. D.

Date of Birth: [redacted]

ODR No. 17832-1516KE

OPEN HEARING

Parties to the Hearing:

Parent[s]

Downingtown Area School District
540 Trestle Place
Downingtown, PA 19335-2643

Representative:

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Date of Hearing: July 20, 2016

Date of Decision: August 12, 2016

Hearing Officer: Brian Jason Ford, JD, CHO

Introduction

This due process hearing concerns the gifted education rights of Student, who is both gifted and has disabilities.¹ The Student's parent (Parent) requested this hearing against the District to challenge the appropriateness of the gifted Math program that the District offered for the 2016-17 school year, which will be the Student's 5th grade year. The District has proposed an enriched, accelerated math program, featuring online and individual work, that will be delivered in the Student's elementary school. The Parent rejected that offer, and seeks an accelerated math program delivered in a regular education classroom outside of the Student's elementary school. For reasons that follow, I find mostly in favor of the Parent.

Issues

1. What gifted Math program must the Student receive during the 2016-17 school year?
2. Where must that gifted Math program be delivered?

Findings of Fact

The entire record was carefully reviewed and considered. Findings of fact are made only as necessary to resolve the issues presented.

School Buildings

1. The Student attends one of the District's elementary schools (Elementary School). The Elementary School houses kindergarten through 5th grade. NT 113.
2. All 6th grade students in the District attend one school building that only houses 6th grade (the 6th Grade Center). See NT 113.
3. The Student's elementary school and the 6th Grade Center are a short drive from each other. NT 69.

The Student

4. There is no dispute that the Student is a gifted student, as defined below. NT *passim*.
5. There is no dispute that the Student is a child with disabilities, as defined below. NT *passim*.
6. For reference:
 - 2013-14 School Year - 3rd Grade
 - 2014-15 School Year - 4th Grade
 - 2015-16 School Year - 5th Grade
 - 2016-17 School Year (upcoming) - 6th Grade

¹ Despite the fact that this is an open hearing, except for the cover page of this decision and order, identifying information is omitted as much as possible.

7. The Student received an initial Gifted Individualized Education Plan (GIEP) on June 7, 2013. P-1. At that time, the Student was not identified as a child with disabilities.
8. The GIEP was based on a Gifted Written Report (GWR) of a Gifted Multidisciplinary Evaluation conducted in May 2013. P-1.²
9. The 2013 GIEP is vague regarding program delivery. However, the record as a whole supports a finding that gifted Math programming was delivered as enrichment through a combination of one-on-one (1:1) instruction, independent worksheets, and computer-based instruction. See, e.g. NT 24, 41, 47, 166-169; P-9.
10. During independent gifted Math enrichment, the Student would seek out peers to socialize with. The Student would also use the computer to play math games instead of advancing math enrichment. This problem, and the Student's overall needs, prompted both the Parent and District to revise the Student's GIEP.³ P-8, P-9, P-11; NT 72-73.
11. On December 5, 2014 (3rd grade), the GIEP was revised. P-2. At this time, a special education evaluation to determine eligibility under the IDEA was pending. *Id* at 7. However, the GIEP team (including the District and Parent) agreed to move the Student into 4th grade Math in a regular education 4th grade math classroom.⁴
12. The District completed its special education evaluation and provided an Evaluation Report (ER) on January 23, 2015. This was a comprehensive evaluation and, although it was administered and used for special education purposes, it provided information about the Student's giftedness as well (i.e. IQ testing and assessments of academic abilities). P-6.
13. The ER was used to draft an Individualized Education Program (IEP) for the Student, which was offered on February 27, 2015. As discussed below, that IEP includes gifted programming to satisfy the Student's gifted needs. Specifically, the IEP calls for grade-level acceleration in Math. P-5 at 26.
14. In practice, nothing about the Student's Math program changed when the IEP went into effect. The Student, a 3rd grader, continued to take 4th grade math in a regular education 4th grade math classroom. NT *passim*.
15. The Student started 4th grade (2015-16 school year) under the February 2015 IEP. As such, the Student took 5th grade Math in a regular education 5th grade math classroom.⁵ NT *passim*.
16. The Student received a new, annual IEP on February 22, 2016. P-4. At that time, the Student was doing well in 5th grade Math. *Id* at 8-9. The Student's gifted Math programming was not changed. *Id* at 23.

² The initial GWR is not in the record as a separate document, but is incorporated into the GIEP at P-1.

³ Some documents suggest that 1:1 instruction was beneficial, but the evidence is preponderant that the Student had difficulty remaining on task during independent work.

⁴ Testimony explains what 4th, 5th and 6th grade math actually is. That particular parsing, while interesting and prompted by the Hearing Officer, ultimately is not a factor in the analysis below.

⁵ There is no dispute about what Math programming the Student had in 3rd or 4th grade, or how that was delivered.

17. Throughout the 2015-16 school year, but especially in the second half of the year, the Parent and District participated in several conversations (in person, by phone and email) about math programming for the 2016-17 school year. Ultimately, via a Notice of Recommended Educational Placement (NOREP) the District proposed 6th grade Math instruction with online enrichment delivered in the Elementary School. S-11.
18. Although the 6th grade Math instruction will be delivered by a teacher, the record preponderantly establishes that: 1) instruction would not occur in a regular education 6th grade classroom, 2) a substantial amount, if not the majority of, the instruction would be online, 3) it is unknown how many other students, if any, would participate in the portion of the program instructed by a teacher in person, 4) even during the in-person portion of the program, instruction is individualized for each student, so that the Student may not be working on the same material as any other student in the classroom (if there are any other students). See, e.g. NT 149-155, 193-194.
19. The NOREP was offered on May 18, 2016. The Parent rejected the NOREP on May 23, 2016. S-11. The Parent requested this hearing on May 31, 2016, demanding 6th grade Math, provided in a regular 6th grade math classroom in the 6th Grade Center, during the 2016-17 school year (5th grade).

Legal Standards

What Law Applies?

It is rare (perhaps novel) in due process litigation to conclude the evidentiary hearing with any doubt about what laws and regulations apply to the matter. As explained below, an issue concerning the applicable law arose during the hearing. Specifically, there was a dispute about whether the Complaint includes special education claims. That dispute was resolved on the record when I found that this matter arises exclusively under Chapter 16. However, in closing briefs, the Parent continues to argue that the Student's special education needs are a factor in this case, and that analysis should proceed under special education jurisprudence. While no motion is made for reconsideration, the Parent's closing functionally re-asserts questions about what standards must be applied in this matter. Therefore, I will re-examine the issue here.

Pennsylvania's gifted education regulations are codified in Chapter 16. The federal law concerning the education of students with disabilities is the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.* The IDEA is implemented through federal regulations at 34 C.F.R. § 300 *et seq.* and, in Pennsylvania, through Commonwealth regulations at 22 Pa. Code § 14 (Chapter 14).

The Student is both a "gifted student," as defined at 22 Pa. Code § 16.1, and a "child with a disability," as defined at 20 U.S.C. § 1401(3).

During this due process hearing, a dispute arose about what legal standard must be used to resolve the case: Chapter 16 or the IDEA (or, perhaps, both). While the dispute initially arose over an evidentiary issue, the question affects the entirety of my analysis. I am not persuaded

that this distinction is outcome determinative, but I must analyze the facts in accordance with the correct legal standard.⁶

The question of what law applies is resolved by first scrutinizing the issues presented. Those issues, as stated above, concern the Student's *gifted* math program. During the hearing, after listening to both parties' opening statements, I confirmed what issues were presented for resolution:

MR. FORD: Thank you. My understanding of the issues after having heard your opening statements is no different than it was after having read the complaint. Essentially, the issues that I'm resolving in this due process hearing is what math program is [the Student] going to receive next year, and where is [the Student] going to receive it. Is my understanding of the issues correct, Counsel?

MS. HALTER: Yes, it is.

MS. METCALFE: Yes.

NT at 14-15. In light of the Complaint, the parties' opening statements, and my recitation of the issues, I conducted the hearing understanding that the Parent had only presented claims under Chapter 16.

As the hearing drew to a close, while the final witness was testifying on cross examination, Parent's Counsel attempted to elicit information concerning the scientific research basis of the District's offered Math program. Recognizing that the research basis of a proposed program may be a factor in assessing appropriateness under IDEA standards, but not under Chapter 16 standards, I stopped the questioning and explained my understanding that the Complaint raised issues under Chapter 16, but not the IDEA. NT at 216.

In response, during the hearing, the Parent initially argued that the claims in the Complaint arise under both Chapter 16 and the IDEA. The Parent's arguments were both substantive and procedural. After hearing the Parent's arguments during the hearing, I concluded that the Complaint presents disputes arising under Chapter 16, but not the IDEA. NT at 216-221. After careful review of the Parent's closing brief, I maintain that conclusion.

Procedurally, the Parent argues that when she filed her due process request, she "did check the box" to indicate that this matter arises under both the IDEA and Chapter 16. NT at 216. The Complaint consists of two documents: a Due Process Complaint form (Form) and a three-page narrative complaint (Narrative). References to the Complaint are to both documents together. The "box" refers to checkboxes at the top of the Form, which present four options: IDEA, IDEA & Gifted Education, Gifted Education, and Section 504. The Parent checked the IDEA & Gifted Education box. The Parent argues that by checking that box, she has signaled that her claims arise under both Chapter 16 and the IDEA. I disagree.

⁶ Beyond the outcome of this hearing, there are other substantial differences between Chapter 16 and the IDEA that, undoubtedly, are important to the parties, but that fall outside of my purview. For example, fee shifting is available under the IDEA, but not Chapter 16. I cannot consider this because I have no authority to award fees. Similarly, IDEA due process decisions are appealable either to federal district court or the Commonwealth Court, but Chapter 16 due process decisions are appealable to Commonwealth Court only. The venue in which this decision may be appealed is irrelevant to my decision making.

The checkboxes, which are not a required part of the Form, identify the Student as both a gifted student and a student with disabilities. It does not identify what claims are raised in the Complaint. Similarly, on the Form, in a blank space that asks for the Student's exceptionalities, the Parent wrote, "OHI-ADHD; Speech Language Impairment; Gifted with Disability." This also says nothing about what claims are raised in the Complaint.

When it comes to the substance of the Complaint – what claims are actually raised – the form asks, "What is the dispute about? Please include facts in your description." and, "How would you like to see this resolved? What are you seeking?". In both of those sections, the Parent wrote, "See attached." referring to the Narrative.

Simply checking a box, or listing off exceptionalities, does not make issues that are otherwise absent from the Complaint somehow plead. It is the substance of the Complaint that determines what issues are plead, no matter which boxes were checked. In this case, that substance is entirely contained in the Narrative. Just as a civil complaint cover sheet (like those used in Commonwealth Court) or a case management track designation form (like those used in federal district courts) does not constitute the substance of a complaint, the Form in this case is not the pleading itself. This is especially so in cases like this one, in which the Form was prepared and filed by an attorney, and refers to a narrative document in the substantive sections.

In addition to the procedural arguments above, the Parent makes two substantive arguments. First, the Parent argues that the Student's needs as a gifted student cannot be addressed separately from the Student's needs as a child with disabilities. See NT at 219-220. Second, the Parent argues that the Complaint raises IDEA claims in the substantive narrative. *Id.*

Regarding the argument that the Student's gifted and special education needs cannot be separated, as stated on the record, I agree that the Student is one whole person. NT at 219. Bluntly, the Student's needs as a gifted learner are not separable from the Student's needs as a student with disabilities. It is not as if the Student's ADHD or Speech/Language Impairment vanish inside a Math class. To the contrary, the District is obligated to offer an IEP that is appropriate for the whole child. This is made clear in Chapter 16 regulations that require LEAs to incorporate gifted education into an IEP when a student is both gifted and disabled, as opposed to drafting separate documents. 22 Pa. Code § 16.7(a).

Under this logic, the Parent argues that appropriateness must be measured against the whole Student. NT at 220. Even so, as I reminded counsel during the hearing, appropriateness is a legal construct and, consequently, "very much depends on what law you're operating under." *Id.* Further, I can only address those claims that are actually plead. The standard of appropriateness under Chapter 16 and the IDEA are similar but not the same. Despite the fact that the Student is a whole person, I am obligated to measure the appropriateness of the District's gifted math program with Chapter 16's yardstick, and not the IDEA's, because IDEA claims are not presented.

Regarding the argument that the complaint presents IDEA claims in substance, I find that the Complaint presents issues arising under Chapter 16 only. The Form includes no substantive information about the dispute, but rather refers to the Narrative. The Narrative is divided by three headings: "Nature of the Problem", "Background", and "Proposed Resolution". The Nature of the Problem section, in its entirety is:

Parent and District disagree as to the location and delivery of gifted services for the child.

Beginning with the background section, the Narrative starts by explaining that Student is accelerated in Math, having completed 5th grade math as a 4th grader. In fact, as requested on the Form, the “Background” section includes facts about Student (again listing the Student’s disabilities), and describes the dispute between the parties.

The Narrative goes on to assert that the parties agree that the Student should take 6th grade math as a 5th grader during the 2016-17 school year. Next, the Complaint recounts the events of an IEP team meeting: the Parent alleges that the option of taking 6th grade math at the District’s 6th grade center was discussed, and held out by the District as an option, if the Parent would provide transportation and waive claims about instructional time missed while the Student went from building to building. The Complaint then goes on to say that the District ultimately refused to offer this option, raising concerns about missed instructional time during building-to-building travel – a concern that the Parent describes as virtually non-existent.

Next, the Parent claims that the real reason why the District is not offering 6th grade Math at the 6th grade center is because the District does not want to pay to transport the Student from building to building. The Narrative then goes on to say what Math program the District offered for the 2016-17 school year, and say that the Parent has rejected the offer.

It must be noted that, in the Complaint, the Parent says why the offered Math program is inappropriate for the Student. In this part of the Narrative, the Parent again states the Student’s exceptionalities, and describes the Student’s past experience with online instruction and one-to-one (1:1) tutoring. According to the Parent, these forms of instruction have been ineffective for the Student in the past. The Parent avers that this form of instruction was ineffective because the Student would “drift” away from the tutor in order to participate in more social class experiences. In the same paragraph, the Parent avers that the Student “learns through social interaction” and that the Student’s IEP includes two social skills goals. These goals, in the Parent’s view, “indicate[] that the [Student] needs to receive instruction with peers to continue to develop [] social skills.”

The Parent does not aver, however, that the proposed Math program in any way interferes with the Student’s rights as a child with disabilities. In other words, the Parent describes the offered gifted Math program as sub-optimal in light of the Student’s learning style, and relates that style to the Student’s disabilities. However, this is quite different than asserting that the District’s failure to offer a gifted Math program featuring instruction with peers violates any of the Student’s rights under the IDEA. The Complaint is completely silent in regard to any relationship between the Student’s disabilities and the location of the offered gifted Math program. Similarly, the Complaint does not describe the offered Math program as entirely online, entirely 1:1, or entirely a combination of both. Viewed in the light most favorable to the Parent, the Complaint alleges that the offered Math program is sub-optimal because of the Student’s special education needs. But there is no claim whatsoever that the offered Math program infringes upon the Student’s rights under the IDEA or its implementing regulations.

Moreover, even if the Complaint could be construed to include IDEA claims, the Parent, via counsel, has admitted that no arguments connecting the offered gifted Math program to the Student’s special education rights are presented in this matter. NT at 220.

Finally, in the Narrative, the Parent says that “[s]witching home schools is also not an option.” Complaint at 6. This relates to the notion that the Student could skip 5th grade entirely and take 6th grade classes in the 6th Grade Center across the board during the 2016-17 school year. The IEP team considered, and then rejected this option as inappropriate. Again, viewing the Complaint in the light most favorable to the Parent, I must note that the concept of a “home” or “neighborhood” school is germane to an analysis of whether an LEA has placed a student in the least restrictive environment (LRE). Placement in the LRE is an important tenet of the IDEA. I will assume, *arguendo*, that moving the Student to the 6th Grade Center for all classes would violate the Student’s IDEA right both as a substantively inappropriate placement (given the Student’s transition needs) and as a procedurally inappropriate placement (given the LRE rules). These are violations that would have occurred had the District offered a different IEP. Saying that the IDEA would have been violated under different circumstances is quite different than saying that the IDEA was violated. Further, the Parent argues in favor of maximizing the number of transitions that will happen in the Student’s day by moving the Student from building to building for one class. Even if the Parent had raised an IDEA claim by presenting an LRE argument in a single sentence, that argument is self-defeating because the District’s proposed placement is less restrictive than the placement that the Parent seeks.

In sum, in the Narrative, as on the Form, the Parent lists the Student’s exceptionalities. The Complaint, as a whole, provides some information about how the Student’s disabilities affect the Student’s educational needs. However, the Parent raises no claim that the District’s offered gifted Math program violates the Student’s special education rights in any way. The Complaint makes no allegation whatsoever that the proposed Math program, or the location in which that program will be delivered, violates the Student’s rights under the IDEA. The Parent, via counsel, admitted as much during the hearing. I will, therefore, determine whether the District’s proposed gifted Math program violates the Student’s rights under Chapter 16.

Chapter 16 - Overview

In Pennsylvania, gifted students are entitled to gifted education, provided in accordance with a GIEP, “which enables them to participate in acceleration or enrichment programs, or both, as appropriate, and to receive services according to their intellectual and academic abilities and needs”. 22 Pa. Code § 16.2(d)(3).

Not every bright student is gifted, and it is important to recognize “gifted” as a term of art. The term “gifted student” is defined by Chapter 16 at 22 Pa Code § 16.1. Under that definition, a student is a gifted student if two criteria are met: First, the student must be “mentally gifted” and, second, the student must also need “specially designed instruction beyond that required in Chapter 4 (relating to academic standards and assessment)”. *Id.* In this case, there is no question that the Student is gifted.

To determine the needs of a gifted student, schools must conduct a Gifted Multidisciplinary Evaluation (GME). A GME is “systematic process of testing, assessment, and other evaluative processes used by a team to develop a recommendation about whether or not a student is gifted or needs gifted education”. 22 Pa Code § 16.1. GMEs are conducted by Gifted Multidisciplinary Teams (GMDT). 22 Pa Code § 16.22(d). “Gifted multidisciplinary evaluations must be sufficient in scope and depth to investigate information relevant to the student’s suspected giftedness, including academic functioning, learning strengths and educational needs.” 22 Pa. Code 16.22(e). The process must include parental input. 22 Pa. Code 16.22(f), and satisfy the substantive requirements at 22 Pa. Code § 16.22(3)(i)-(v). In this case, since the Student also has disabilities and receives special education, the GME may be part of special

education evaluations, provided that the same criteria are satisfied. Moreover, in this case, there is no dispute about the appropriateness of any of the Student's evaluations.

Once a gifted student is properly evaluated, schools provide gifted education through a GIEP. "A GIEP is a written plan describing the education to be provided to a gifted student. The initial GIEP must be based on and be responsive to the results of the evaluation and be developed and implemented in accordance with [Chapter 16]." 22 Pa. Code § 16.31. In this case, since the Student also has disabilities and receives special education, the GIEP is incorporated into the Student's IEP. 22 Pa. Code § 16.7(a). To the extent that the Student's IEP provides gifted education, those aspects of the IEP must comply with Chapter 16 standards. See *id.*

Chapter 16 includes a host of procedural requirements for GIEPs and their development. 22 Pa. Code § 16.22. In this case, no claims are raised concerning those procedural requirements. Rather, this case is all about the substance – the appropriateness of the gifted Math program offered in the Student's IEP. As explained above, the appropriateness of that program is judged against Chapter 16 standards.

Chapter 16 - Substantive Standards

Some substantive gifted education requirements come from the definition of "gifted education", found at 22 Pa. Code § 16.1. Pertinent to this case, gifted education consists of "specially designed instruction to meet the needs of a gifted student that is: ... Individualized to meet the educational needs of the student. ... [and] Reasonably calculated to yield meaningful educational benefit and student progress." *Id.* The term "specially designed instruction" (SDI) contained within the definition of gifted education is defined in Chapter 16 as "adaptations or modifications to the general curriculum, instruction, instructional environments, methods, materials or a specialized curriculum for students who are gifted." *Id.*

Appropriateness of gifted education is relative to the purposes of Chapter 16. Two of Chapter 16's purposes are pertinent to this case. First, Chapter 16 functions to ensure "Gifted education for each gifted student which is based on the unique needs of the student, not solely on the student's classification." 22 Pa. § 16.2(d)(2). Second, Chapter 16 ensures "Gifted education for gifted students which enables them to participate in acceleration or enrichment programs, or both, as appropriate, and to receive services according to their intellectual and academic abilities and needs." 2 Pa. § 16.2(d)(3).

Consistent with those purposes, gifted placement decisions must be based on student's evaluated needs. 22 Pa. Code § 16.41(a). However, the substantive requirements for appropriate gifted education, as codified in Chapter 16, are minimal. An appropriate gifted placement must:

1. Enable the provision of appropriate specially designed instruction based on the student's need and ability.
2. Ensure that the student is able to benefit meaningfully from the rate, level and manner of instruction. [And]
3. Provide opportunities to participate in acceleration or enrichment, or both, as appropriate for the student's needs. These opportunities must go beyond the program that the student would receive as part of a general education.

22 Pa. Code § 16.41(b).

In addition to these substantive requirements, there are certain prohibitions. As the Parent emphasizes, gifted placement determinations may not be based on “lack of availability of space or of a specific facility” or “administrative convenience.” 22 Pa. Code § 16.41(e)(4)-(5). Similarly, schools must provide transportation to gifted students so that they may access the services that are necessary to carry out a GIEP or, as in this case, the gifted elements of an IEP.

The Burden of Proof

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, the burden of proof lies with the Parent.

Discussion

The Parent argues that the District ruled out placement in 6th grade Math at the 6th Grade Center because it does not want to transport the Student between buildings. Although no preponderant evidence was presented about what that transportation would cost, or whether that transportation would be inconvenient for the District, I will assume for the sake of argument that such transportation would be both costly and inconvenient. As such, it is impermissible for the District to deny the Student placement in the 6th Grade Center only to save money or for its own convenience. I can make this assumption because, contrary to the Parent’s argument, these factors are not relevant to this case.

The Parent’s initial burden is to prove that the District’s offered placement is inappropriate. Cost and convenience are not defenses when schools offer inappropriate gifted placements. Chapter 16 precludes these defenses. However, if two competing placements are equally appropriate in substance, nothing in Chapter 16 precludes the District from choosing the less expensive or more convenient program. If the Parent can prove that the District’s offer is inappropriate, the District cannot counter by establishing the convenience or savings derived from its offer. But the District makes no such argument. Rather, the District argues that its offer is substantively appropriate. It is the Parent’s burden to prove otherwise.

The Parent argues that the District’s gifted Math offer is inappropriate. The Parent correctly highlights that, since 3rd grade, the Student received math in a regular education classroom, one grade above level (meaning 4th grade math as a 3rd grader in a regular education 4th grade math classroom, and 5th grade math as a 4th grader in a regular education 5th grade math classroom). Both parties agree that these placements were appropriate for the Student. The parent also argues that the 3rd and 4th grade placements represent a beneficial change from less effective 1:1 instruction and individual work (either worksheets or computer work) that was provided before 3rd grade. The problem with this 1:1 or individual work was that, instead of focusing on Math, the Student would seek out peers to socialize with. Starting in 3rd grade, both parties agreed that placement is a regular education classroom, albeit accelerated by a full academic year, would reduce incidents of the Student seeking peers to socialize with during Math time. There is no dispute that the 3rd and 4th grade accelerated placements in regular education classrooms were appropriate for the Student during those school years.

The crux of the Parent’s argument is that nothing has changed. Since December 2014, both parties agreed that full-year acceleration in Math, provided in a regular education classroom, was appropriate for the Student. What the District has proposed for the upcoming school year

represents both a significant departure from the type of program that all agree has been appropriate. The Parent argues that the only real change is that the next regular education Math classroom is located in a different building. Again, the inquiry is not whether the District's proposal costs less or is more convenient. Rather, the inquiry is to the substantive appropriateness of the offer. The appropriateness of the offer relates to the Student's evaluated gifted needs. Therefore, when a program changes, there should be evidence that the change was necessary in order to meet the Student's gifted needs. The Parent argues that this evidence does not exist. I agree.

The Student initially received a GIEP in the summer of 2013. That GIEP controlled the Student's placement during 2nd grade (the 2013-14 school year) and into the Student's 3rd grade year (the 2014-15 school year). The GIEP was revised in December 2014 (3rd grade) to move away from 1:1 instruction with individual worksheets and computer work to placement in a 4th grade regular education Math class. The evidence preponderantly establishes that this change was a reaction to both parties' concerns about the Student seeking social interaction during Math.⁷

Shortly after this change in the Student's gifted program, in January 2015 (3rd grade) the Student was found to be a student with disabilities. The Student received an initial IEP in February 2016 to address those disabilities. The IEP did not change the Student's gifted program. It essentially incorporated and subsumed the prior GIEP.

The District has not formally evaluated the Student's gifted needs since the summer of 2013. The January 2015 evaluation was comprehensive, but was not used to assess the Student's gifted needs or evaluate the Student's gifted program. Regardless, after the last evaluation (either 2013 or 2015) the District and Parent concluded that full year acceleration in Math, delivered in a regular education classroom, was necessary to meet the Student's needs as a gifted student.⁸ Now, in the absence of data suggesting that a change is necessary, and without an evaluation, the District proposes a radical departure from what has worked so well since December 2014.

To be clear, there is a record of why the District proposed the change. Certainly, the location of the buildings was a factor. This was discussed both in and outside of IEP team meetings. Also, the District used to simply accelerate gifted students (providing building-to-building transportation) without serious inquiry into the students' needs. This resulted in corrective action from the Pennsylvania Department of Education, ultimately prompting the District to eliminate building-to-building transportation for gifted students.⁹ District personnel also testified, credibly,

⁷ The Student was able to complete independent work on an iPad in other subjects during 3rd and 4th grade to make up instruction missed while taking 4th and 5th grade Math. See, NT 145-147. The District holds this up as proof that the Student is able to work independently. I reject this argument. The record shows that the Student was able to do 3rd grade work as a 3rd grader independently, and 4th grade work as a 4th grader independently. Doing accelerated work independently or 1:1 caused enough trouble that the parties agreed to dramatically reconfigure the Student's gifted program. It is certainly possible that the same would not happen now, but this conjecture does not eliminate the District's obligation to evaluate the Student before substantively altering the Student's gifted program.

⁸ The District does not argue that the gifted placement in 3rd or 4th grade somehow exceeded the District's obligations to the Student.

⁹ See S-11. The District presented a menu of 6 options to similarly situated parents. It is unclear how presenting this menu constitutes consideration of each child's individual needs, but the

that the offered program was effective for other gifted students. See, e.g. NT at 194. None of this constitutes an inquiry into the Student's individual needs. None of this is evidence that the Student's needs changed in some way that a change in the Student's gifted program is needed.

In sum, the District is obligated to offer gifted programming that is responsive to the Student's evaluated needs. In 2013, in response to a gifted evaluation, the District proposed 1:1 and individual Math work. When problems arose with that gifted instruction, the District proposed full year acceleration in Math, provided in a regular education math classroom. That proved effective. The Student was evaluated again, albeit for special education purposes, in 2015. The Student's gifted program did not change as a result of the evaluation. The accelerated Math program in a regular education classroom continued to be appropriate. Now, without any evidence specific to the Student that a change is necessary, the District proposes a return to the type of instruction that caused problems in the past. When gifted education is working, a school may not substantively alter a student's GIEP (or the gifted portions of an IEP) without first evaluating the Student's needs in conformity with Chapter 16. In this case, such an evaluation was not completed, and so the proposed change cannot be appropriate – regardless of the purported reasons for the change.

The District must continue to provide 6th grade math in a regular education 6th grade classroom until such time as an evaluation suggests this is no longer necessary or should be replaced with something else. Both parties appear to be working under the assumption that this program can only be delivered in the 6th Grade Center with building-to-building transportation. In fact, the Parent specifically demands this exact placement. I deny this demand. The Parent has proven that the program offered by the District is inappropriate because it constitutes a change in Student's gifted placement in the absence of an evaluation. Further, the evidence preponderantly establishes that grade acceleration in Math, delivered in a regular education classroom, is appropriate for the Student.¹⁰ The Parent has not proven, however, that the only way to place the Student in 6th grade Math in a regular education 6th grade math classroom is to transport the Student to and from the 6th Grade Center. The District has options for accomplishing this. The record is absolutely silent as to why 6th grade math in a regular education 6th grade classroom cannot be provided outside of the 6th Grade Center. If the 6th Grade Center truly is the only option, the District must provide transportation. If the District wants to provide 6th grade math in a regular education 6th grade math classroom in some other way, it may do so. Again, cost and convenience are not defenses to inappropriate gifted programs, but the District may provide an appropriate gifted program in the most cost-effective and convenient way.

Similarly, while no special education claims are raised, the Parent advocates for a system that maximizes the number of transitions that will occur throughout the Student's day. While the issue is not before me, I have very serious concerns about the impact that those transitions will have on the Student, given the Student's special education needs.¹¹ District witnesses testified credibly in regard to their concerns about the Student's difficulty with transitions. See, e.g. NT 122. The District's proposal for gifted Math instruction is inappropriate only for the lack of an

Parent does not raise the issue. While full-grade acceleration was a choice (i.e. moving to the 6th Grade Center for all classes as a 5th grader), building-to-building transportation for individual classes was not offered.

¹⁰ There is no argument to the contrary, and all evidence shows that the Student did well.

¹¹ If special education claims had been raised, this decision may have ended differently for this reason. Seen through an IDEA or Chapter 14 lens, it is the Parent who is seeking a change in placement, not the District.

evaluation supporting the change. In determining the logistics of appropriate Math instruction for the Student, the District must take care to ensure that the Student receives a FAPE under all of the laws that attach to the Student's education.

ORDER

Now, August 12, 2016, it is hereby **ORDERED** as follows:

1. The gifted math program and placement offered by the District for the 2016-17 school year is not appropriate.
2. Appropriate gifted Math programming for the Student must include placement above grade level, but in a regular education classroom for the grade level. This form of gifted Math programming must continue until an evaluation conducted in accordance with 22 Pa. Code § 16 indicates that such a program is no longer necessary or should be replaced with something different. During the 2016-17 school year, this means that the Student must be placed in 6th grade Math in a regular education 6th grade math classroom.
3. The District may exercise its discretion regarding the physical location of the 6th grade math classroom that the Student will attend during the 2016-17 school year in accordance with this Order.

It is **FURTHER ORDERED** that any claim not specifically addressed in this order is **DENIED** and **DISMISSED**.

/s/ Brian Jason Ford
HEARING OFFICER