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Pennsylvania Special Education Hearing Officer

DECISION

Child's Name: MZ

Date of Birth: xx/xx/xx

Dates of Hearing:
May 24, 2007; June 12, 2007
OPEN HEARING
ODR #7620/ 06-07 LS

Parties to the Hearing:

Pocono Mountain School District
P. O. Box 200
Swiftwater, PA 18370

Representative:

Pro Se

Brian Jason Ford, Esquire
King, Spry, Herman, Freund
&Faul, LLC
One West Broad Street, Ste 700
Bethlehem, PA 18018

Date Record Closed:

June 16, 2007

Date of Decision:

June 30, 2007

Hearing Officer:

William F. Culleton, Jr., Esquire

INTRODUCTION

Student is a xx year old resident of the Pocono Mountain School District (District). Student is identified under 24 P.S. §13-1371; 22 Pa. Code §16.1 et seq. as gifted and has a GIEP calling for special education services. (NT 117-9 to 14.) Mr. and Mrs. (Parents) requested due process, asserting that the District failed to implement two successive GIEPs and what the parties called a Pendency Agreement, thus failing to provide appropriate special education services to the Student in the 2006-2007 school year. (NT 96-18 to 97-4.) The Parents requested compensatory education for the year. (NT 94-7 to 95-25.) The District asserted that it had substantially complied with the GIEP, and that the hearing officer lacked jurisdiction over the issue of implementation of the Pendency Agreement, effectively depriving the hearing officer of jurisdiction regarding a period of seventy one days.

PROCEDURAL HISTORY

On or about September 15, 2006, the District offered the Parents a GIEP, with which the Parents disagreed. (NT 27-20 to 23; HO-3 p. 11.) On September 21, 2006, the Parents filed a request for due process. (NT 25-5 to 23; HO-3 p. 11.) On October 26, 2006, the parties entered into the Pendency Agreement purporting to alter the terms of the Student's pendent placement. (NT 29-15 to 30-4; HO-3.) On November 14, 2006, the Parents withdrew their due process request. (NT 30-3 to 11.) Also on November 14, 2006, the parties agreed upon a GIEP covering the remainder of the school year, and on November 20, 2006, the Parents signed a NORA incorporating the terms of the November 20, 2006 GIEP. (NT 30-5 to 9, 79-78-25 to 79-4; S-2.)

On April 27, 2007, the Parents filed the instant request for due process. (HO-1 p. 6 to 8.) On May 9, 2007, the District moved to dismiss for lack of specificity of the complaint, (HO-1), and the Parents provided an amended complaint with further detail on May 8, 2007, (HO-2, 4). The hearing officer denied this motion as moot by letter dated May 16, 2007. (HO-6.) On May 10, 2007, the District filed a Motion for Clarification and Directive, to which the Parents responded on May 23, 2007. (HO-3, 7.) On May 16, 2007, the hearing officer decided part of the motion and deferred the remainder to the initial hearing date. (HO-6.) On May 16, 2007, the District filed a motion to bifurcate the hearing, which was denied. (HO-5.) The initial hearing commenced on May 24, 2007, and the hearing officer decided the pending motions. (NT 1-1 to 83-14.) Between May 31, 2007 and the second hearing session on June 12, 2007, the parties filed various requests and motions concerning review of documents, witnesses and the expansion of the issues to be addressed in this due process proceeding. (HO-8 to 17.) These were addressed at the second session on June 12, 2007. (NT 366-1 to 389-13.)

ISSUES

1. From September 5, 2007 through October 26, 2006, did the District fail to provide appropriate special education services, in accordance with the prevailing GIEP, with regard to mathematics?
2. From September 5, 2007 through October 26, 2006, did the District fail to provide appropriate special education services, in accordance with the prevailing GIEP, with regard to leadership/interpersonal skills?
3. During the 2006-2007 school year, did the District fail to provide appropriate special education services, in accordance with the prevailing GIEP, with regard to language arts and creative writing, through enrichment activities assessed at the seventh grade level during language arts classes?
4. During the 2006-2007 school year, did the District fail to provide appropriate special education services, in accordance with the prevailing GIEP, with regard to creative problem solving, through instruction in and use of a problem solving rubric?
5. During the 2006-2007 school year, did the District fail to provide appropriate special education services, in accordance with the prevailing GIEP, with regard to reading?
6. During the 2006-2007 school year, did the District fail to provide appropriate special education services, in accordance with the prevailing GIEP, with regard to research techniques, through work on two research projects during classroom time?
7. Should compensatory education be awarded for the above periods?
8. Should the hearing officer order the District to train its employees with regard to the education of gifted students?

FINDINGS OF FACT

1. In the 2005-2006 school year, the Student was accelerated from third to fifth grade due to her very superior curriculum based testing and performance in third grade. (NT 116-23 to 117-14, 119-25; S-2 p. 2, 3.)
2. On September 16, 2005, the parties signed a GIEP for the 2005 to 2006 school year, which was to govern gifted education for the Student until September 19, 2006. (NT 27-18 to 20; HO-3 p. 11; P-1.)

3. The 2005-2006 school year began on September 5, 2006; the Student's gifted education was governed from then until October 26, 2006 by the September 2005 GIEP. (NT 25-15 to 18; P-1.)
4. On October 26, the Parties agreed to a Pendency Agreement that described the gifted services to be provided from October 26 until a new GIEP should be decided. (HO-3 p. 11 to 13.)
5. On November 14, 2006, the District and Parents agreed upon a GIEP that provided for formalized instruction in creative problem solving; enrichment in language arts; instruction in reading skills including comprehension, inference and character; as well as enrichment and instruction in research techniques. (S-2.)
6. The services required under the November 14, 2006 GIEP were required to begin by November 20, 2006 and continue until June 30, 2007. The Parents signed the NORA on November 20, 2006. (S-2 p. 9, 10, 11, P-29 p. 1.)
7. The District's gifted education teacher, who also served as the student's case manager for gifted education, notified all relevant teachers of their responsibilities under the November 14, 2006 GIEP on November 30, 2006, and by December 4, the assigned teachers were still deciding on lines of communication and organization for implementing the November 2006 GIEP. (NT 192-17 to 193-1; S-3, P-16 p. 2.)
8. The gifted education teacher implemented a computer based communication system for all gifted instruction of the Student before December 5, 2006, and the Student began work pursuant to her November 2006 GIEP within two weeks of the signing of the NORA on November 20, 2006. (NT 252-11 to 253-19, 254-12 to 258-9, 266-9 to 12, 267-1 to 7; P-10 p. 1 to 7, P-13, P-16 p. 4.)

Mathematics

9. The September 2005 GIEP determines that the Student needs activities to remediate gaps in mathematics learning that were due to her acceleration from third to fifth grade. It requires the District to provide enrichment, alternative and remediation activities in operational fluency, fractions, decimals, and fifth grade assessment anchors. (NT 447-11 to 17; P-1 p. 3.)
10. The September 2005 GIEP requires the District to provide timed testing in mathematics. (NT 447-11 to 17; P-1 p. 4.)

11. Beginning before September 5, 2006, the District did provide instruction and testing to the Student in fractions, decimals and fluency. (NT 447-1 to 449-3; P-35 p. 98 to 111.)
12. The November 2006 GIEP does not determine that the Student has an educational need in the area of mathematics. (S-2 p. 2, 3.)

Leadership/Interpersonal Skills

13. The September 2005 requires the District to provide an opportunity to participate in activities that facilitate interaction with gifted and non-gifted students, including playing games with a gifted class and discussions with teachers and peers. (P-1 p. 3, 6, 7.)
14. The November 2006 GIEP does not identify an educational need in the areas of leadership and interpersonal skills. (S-2 p. 3.)

Language Arts

15. The November 2006 GIEP requires the language arts teacher to provide enrichment activities related to literature, parts of speech and writing, assessed at the seventh grade level during specified language arts class times. (S-2 p. 6.)
16. The language arts class was composed of a number of gifted students as well as non-identified students. Some gifted enrichment activities were provided to the entire class and some were provided to the Student individually. (NT 346-12 to 347-20.)
17. In December and January 2006, the language arts teacher provided an enrichment activity focusing on writing skills, punctuation of quotations and the first person point of view, assessed – but not graded - at the seventh grade level. (NT 128-6 to 22, 456-2 to 10; P-16 p. 4, P-17 p. 1 to 5, P-25 p. 1 to 15, P-35 p. 3, P-35 p. 156-168.)
18. Subsequently, the language arts teacher provided additional enrichment activities according to the GIEP. These activities were designed to address the Student's individual needs. (NT 335-8 to 336-18, 509-9 to 513-19, 519-10 to 530-13.)
19. In the area of language arts, the November 2006 GIEP requires the language arts teacher to provide to Parents the grading rubric for each enrichment activity as it was developed. (S-2 p. 6.)

20. By December 6, 2006, the district had selected a rubric for the Turkey Talk activity and conveyed it to the Parent. The language arts teacher continued to communicate with the Student's mother regarding her plans for the Student. (P-10 p. 8, 9, 11, P-16 p. 1 to 14, P-17.)
21. The language arts teacher did not provide rubrics to the Parent for every language arts enrichment activity she provided to the Student; not every activity requires a rubric. The teacher assessed these activities at the seventh grade level. Written work with assessments typically was returned to the Student rather than being sent to the Parents. (NT 334-13 to 336-18, 341-2 to 344-3, 344-17 to 345-6, 441-19 to 446-25, 509-9 to 513-19, 515-10 to 516-9, 516-20 to 518-8; P-35 p. 62 to 96.)
22. The language arts teacher provided instruction, guidance and assessment to the Student in completing her independent research and writing project on the subject of mummification. This constituted an additional enrichment activity. (NT 327-23 to 333-8.)
23. The Student made reasonably meaningful progress in language arts gifted education during the 2006-2007 school year. (NT 353-14 to 22.)

Creative Problem Solving

24. The September 2005 GIEP requires the District to provide an opportunity to participate in enrichment, alternative and extension activities, including competitions, conferences and other special events as appropriate. (P-1 p. 3, 6.)
25. Under the Pendency Agreement, the Student was to be provided with instruction in creative problem solving according to a creative problem solving method entitled the SCAMPER. (NT 287-9 to 288-9; HO-3 p. 11.)
26. The November 2006 GIEP requires the gifted education teacher to provide a problem solving prompt and instruct the Student in the use of the SCAMPER problem solving method and in analysis, in a pull-out gifted education classroom. (S-2 p. 3, 4, 5, 9.)
27. During the first six weeks of the 2006-2007 school year, the Student was instructed in the use of the SCAMPER method. (NT 287-9 to 288-9; P-11 p. 6.)
28. From early in the 2006-2007 school year, the Student had been involved in an enrichment activity called the School Store project. This was a group project in which the gifted students would be pulled from a regular education class, and students themselves developed both the project and

the grading rubric for the project. The project was continuing, and the rubric was being revised continually with student input, thus making it impossible to send the rubric to the Parent before the Student participated in the project. (NT 209-25 to 211-17, 216-15 to 17; P- 10 p. 11, 13, 14, 28, P-11 p. 6.)

29. In the beginning of the 2006-2007 school year, the gifted education teacher excluded the Student from a gifted activity that he was teaching on three occasions. (NT 427-12 to 432-14.)
30. The November 2006 GIEP requires the gifted education teacher to inform the Parents of the requirements for each task as it is developed. (S-2 p. 6.)
31. On December 4, 2006, the gifted education teacher provided rubrics to the Parent for an archeology research project. (P-11 p. 1, 2.)
32. The gifted education teacher decided to remove the Student from the School Store group project and require her to work separately, so that he could alter the project for her in order to provide the Parent with a rubric before the student worked on the project. (NT 223-14 to 20; P-10 p. 21, 23, 29, 31, 32, 34, 36.)
33. On December 7, 2006, the Student's principal forwarded a rubric for the Student's individual participation in the School Store activity. (P- 10 p. 13.)
34. The Parent objected and the Student continued in the group project to completion. (NT 292-20 to 293-4, 298-12 to 299-2; S-10.)
35. The November 2006 GIEP requires the gifted education teacher to assess the Student's proficiency by utilizing a five point rubric addressing SCAMPER use, analysis, self-directedness and teamwork, and presentation. (S-2 p. 4.)
36. The teacher assessed the Student's progress according to a rubric. (NT 291-19 to 292-4.)
37. The November 2006 GIEP requires the gifted education teacher to report the Student's progress on short term learning outcomes to the Parents. (S-2 p. 6.)
38. The gifted education teacher's practice was to assess the Student's activities in writing on the activities themselves and return them to the Student with the intention that they be returned home by the Student to the Parents. (NT 203-19 to 204-8.)

39. On December 20, 2006, and again after March 29, 2007, the gifted education teacher forwarded progress reports on the Student's performance to the Parents. (NT 289-21 to 290-1, 296-12 to 297-3; P-11 p. 11, 12, 16.)
40. The Student made reasonably meaningful progress in creative problem solving during the 2006-2007 school year. (NT 291-11 to 293-4.)

Reading

41. The September 2005 GIEP requires the District to provide alternative, differentiated reading activities in place of remediation and rereading activities, as needed and as determined appropriate by the gifted education teacher. It also requires the District to provide the Student with an opportunity to participate in the Junior Great Books program. It also requires provision of the Challenge Spelling List as appropriate. (NT 456-2 to 18; P-1 p. 3, 4, 5.)
42. The Student did work on Junior Great Books during the 2006-2007 school year. (NT 428-6 to 429-16, 456-24 to 457-2.)
43. The November 2006 GIEP requires the District to address the Student's needs in the areas of comprehension, inference and character. (S-2 p. 7.)
44. The District provided curriculum based testing to the Student in reading. (NT 125-20 to 126-4, 235-21 to 236-8, 238-22 to 239-25; P-24.)
45. The language arts teacher provided a novel to the Student that is for readers at the seventh grade level. (NT 345-7 to 346-17.)
46. The November 2006 GIEP requires the District to assess the Student's performance at the end of the fourth quarter of the 2006-2007 school year, utilizing the Pennsylvania 4Sight Assessment. (S-2 p. 7, P-37.)
47. The District assessed the Student with the Pennsylvania 4Sight Assessment, and she attained her goals set forth in the GIEP. (NT 294-23 to to 25.)

Research Techniques

48. The November 2006 GIEP requires the District to provide the Student with an opportunity to work independently to on two research projects during one period per day in place of her sixth grade reading class. (S-2 p. 7, 8, 9.)

49. The November 2006 GIEP requires the gifted education and regular education social studies teachers to approve two research topics, one in social studies, based upon the sixth grade social studies curriculum, and one in science. The teachers are required to collaborate with the student in selection of these topics, adhering to a specified time frame. (S-2 p. 7, 8.)
50. The GIEP team's plan was that the Student would work independently during that period, with direction from the gifted education teacher and other teachers through an electronic bulletin board system called "Blackboard." (NT 161-4 to 162-2, 162-18 to 163-20, 184-24 to 185-17, 195-20 to 197-5; P- 13.)
51. In the area of humanities, the Student is able to self direct her learning. (S-2 p. 3.)
52. In the first few weeks, communication for this class was performed largely through the Blackboard" system, but the Student also had access to direct conversation with teachers by telephone and in person; this access was sometimes but not always available during the times at which the Student was working independently on her research projects. The Student did not fully make use of these resources while working independently on her research explorations projects. (NT 162-5 to 16, 163-19 to 20, 251-1 to 265-2, 282-11 to 20, 315-4 to 316-11, 406-7 to 16; P-13.)
53. During this period, communication was largely through the Blackboard system. There were a substantial number of days on which the Student felt confused about what she was expected to do and the gifted education teacher did not respond to her requests for guidance. The Student resorted to sending email messages to her mother reflecting that she was bored. (NT 409-20 to 414-18; P-13 p. 14 to 18, P-14 p. 1 to 15.)
54. After a GIEP team meeting on February 6, 2007, the District addressed the problems that had developed with the research explorations class, although it did not revise the GIEP. The gifted education teacher delegated all research exploration supervision to the other members of the team and the language arts teacher began providing more frequent and direct supervision of the Student. The Director of Special Education began exploring ways in which different enrichment activities could be substituted for the research explorations class. (NT 156-17 to 157-1, 168-13 to 24, 184-9 to 23, 205-6 to 14, 273-23 to 274-2, 275-7 to 15, 480-7 to 24; P-35 p. 112 to 122.)
55. From the end of January until the end of March, 2007, the Student and her mother exchanged numerous emails in which the Student's mother provided responses to the Student's requests for direction in a project on mummification that had not been assigned by the gifted education teacher,

but had been suggested by the Student, another teacher, and the Student's mother. The Student completed the research and produced a power point presentation on mummification, with supervision from her mother and teachers. The District did not assign the project or grade it; it was presented to the Student's mother, not to her teacher. (NT 328-16 to 333-8, 351-10 to 352-11, 414-19 to 421-21, 435-5 to 7; P-14 p. 13 to 19, P-14A p. 1 to 99, P-14B¹, P-15 p. 77 to 81.)

56. On February 20, 2007, the Director of Special Education provided a demonstration CD for the study of Latin to the Student at the request of the Parents, as a substitute for the research explorations class. (NT 169-5 to 170-11; P-15 p. 82.)
57. In March, the parties agreed to order a full instructional program in Latin. It was provided on or about April 11, 2007. (P-15 p. 82 to 99.)
58. The November 2006 GIEP requires the gifted education, language arts, reading and regular education social studies teachers to provide instruction in research techniques to the Student. (S-2 p. 7, 8, 9.)
59. From December 5, 2006, to January 25, 2007, the gifted education teacher collaborated with the Student on multiple occasions as she narrowed her selected research topic for her social studies research project, and selected a possible topic for her science research project. (NT 267-12 to 268-21, 290-11 to 17; P-10 p. 11, P-13 p. 1 to 14, 18.)
60. From December 5, 2006 until January 25, 2007, the gifted education teacher, the language arts teacher and the social studies teacher provided instruction to the Student on research techniques including identification of research targets and utilization of index cards to preserve both information and source. (NT 313-16 to 314-9, 405-16 to 406-1; P-13 p. 1 to 14, 18, P-16 p. 4, P-35 p. 63.)
61. From February 8 to May 3, 2007, the assigned teacher provided instruction to the Student in research techniques. (S-11 p. 1, 2, 3, 4, 5, 6, 7, 9, 15, 16, 18, 19, 20, P- 112 to 133.)
62. From February 8 to May 3, 2007, the language arts teacher provided guidance and organizational assistance to the Student in completing a social studies research project that the Student's mother had directed the Student to begin previously. (NT 351-10 to 352-19; S-11 p. 1, 2, 8, P-35 p. 112, 115.)
63. From the end of January, 2007 until May 15, the social studies teacher provided guidance and instruction to the Student in rewriting the outline

¹ Parents' Exhibit 14B is a CD Rom containing the power point presentation on mummification.

and essay for the social studies research project on Pirates and Grace Kelly. (NT 315-4 to 317-24.)

64. From February 8 to May 3, 2007, the language arts and science teacher provided the Student with a meaningful opportunity to work independently on a research project involving science. (NT 349-3 to 22; S-11, P-34 p. 7, P-35 p. 113 to 133.)
65. From February 8 to May 3, 2007, the assigned teacher corresponded with the Student on a frequent basis through written notes, collaborated with the Student in selecting a topic for the science research project, set deadlines and approved a selected topic. (NT 483-17 to 25; S-11 p. 1, 2, 3, 8, P-34 p. 112 to 133.)
66. The November 2006 GIEP requires the District to provide the Student with access to the school library and adequate time to select sources relevant to the selected research topics. (S-2 p. 8.)
67. From February 8 to May 3, 2007, the District provided the Student with access to the school library for her research projects, providing her with adequate time to complete the research, as well as other assistance with needed resources. (NT 235-4 to 20; S-11 p. 1, 2, 4, 5, 8, 17.)
68. In the area of research techniques, the November 2006 GIEP requires the District to assess the Student's performance according to a research rubric and a rubric for a one page essay on the selected research topics. (S-2 p. 8.)
69. The assigned teachers assessed the Student's social studies and science projects according to a rubric. (NT 246-9 to 247-3, 284-14 to 285-16; S-14, P-10 p.10, P-16 p. 14, P-21 p. 3, P-34 p. 1 to 2, P-35 p. 141 to 144.)
70. The rubric was in compliance with the specifications of the GIEP. Its scoring differed from that specified in the GIEP, in that it specified a higher number of sources required for a perfect score, but it did not alter the minimum number of sources required in the GIEP. (NT 247-4 to 250-25; P-10 p. 8 to 10.)
71. In February and March 2007, the assigned teachers provided assessment rubrics to the Student and the Parents for the social studies and science research projects, and explained them to the Student's mother. (NT 197-24 to 198-6; S-11 p. 1, 2, 3, S-14, P-16 p. 10 to 14, P-21 p. 6 to 12, P-34 p. 1 to 2, P-35 p. 133,, P-141 to 144.)
72. The November 2006 GIEP requires the District to assess the Student's completion of the two research projects required by the GIEP. One is to

be completed at the end of the second marking period and one is to be completed at the end of the fourth marking period. (S-2 p. 7, 8.)

73. The Student completed a social studies research project and a science research project. (NT 282-25 to 286-4, 313-6 to 315-23, 435-2 to 4; S-14 p. 3, 4, 5, 6, P-13 p. 19 to 26, P-21, p. 6. P-34 p. 1 to 6.)
74. The social studies project was completed later than specified in the GIEP. (NT 272-1 to 273-10, 306-13 to 307-18; P-34.)
75. The November 2006 GIEP requires the gifted education teacher to provide the Parents with progress reports on the Student's short term learning outcomes at the same time as the provision of the Student's progress reports. (S-2 p. 9.)
76. The gifted education teacher did not report all assessments of gifted activities to the Parents, nor did he grade any of the gifted activities. He did assess each activity, providing feedback to the Student. (NT 193-2 to 194-19, 198-7 to 200-13.)

Staff Training

77. The Student's principal was adequately trained in providing education to gifted students. (NT 110-4 to 19.)
78. The Student's gifted education teacher was adequately trained in providing education to gifted students. (NT 191-1 to 192-14.)
79. The Student's language arts and science teacher was adequately trained in providing education to gifted students. (NT 352-25 to 353-10.)

DISCUSSION AND CONCLUSIONS OF LAW

Jurisdiction

The District's May 10, 2007 Motion for Clarification and Directive questioned this administrative hearing officer's jurisdiction to consider the Parents' complaint about delivery of services during the period between September 5, 2006 and November 14, 2006. (NT 12-1 to 25; HO-3 p. 2.) The District asserted that this period was governed by the October 26, 2006 Pendency Agreement, (HO-3 p. 11 to 13), and that only the courts have jurisdiction to adjudicate issues regarding such private contracts. (NT 31-6 to 33-16.) The Agreement purported to govern only a twenty day period from its inception on October 26, 2006 until November 14 when the Parents withdrew their first due process request; however, the District argued that the Agreement was part of a settlement that encompassed the entire period covered by the due process request, including the period

between September 5, 2006 and November 14, 2006. (NT 21-18 to 27-14.) Thus, the District argued that this hearing officer was deprived of jurisdiction to consider the sufficiency of gifted services during the entire period from September 5, 2006 to November 14, 2006.

The Parents argued that the Agreement was not part of a settlement, and that it must be read narrowly to govern only the terms of pendency during the period in which the previous due process request was being resolved; that due process request was resolved in their view by withdrawal of the request, not by settlement. (NT 27-13 to 30-11, 33-25 to 34-21.) The Parents also argued that the hearing officer has jurisdiction despite the private agreement, because due process is appropriate to adjudicate the Student's statutory rights to educational services which stand independent of and in addition to any privately created rights pursuant to the Agreement. (NT 30-12 to 21.)

The hearing officer ruled that he does have jurisdiction over the Parents' claims for the period between September 5, 2006 and November 14, 2006. (NT 81-10 to 14.) The hearing officer concluded that the Pendency Agreement was limited in scope; it was not the comprehensive settlement described by the District. (NT 77-22 to 78-19.) The hearing officer found that the Agreement was not a comprehensive settlement of the previous due process request; rather it was limited in scope to defining only what services would be considered the pendent placement during the twenty days between the execution of the agreement on October 26, 2006, and the withdrawal of the due process request on November 14, 2006. (NT 78-20 to 81-14.) The instant due process complaint, by contrast, addresses whether or not legally adequate services have been delivered during a larger period of time that includes that twenty day period. (NT 75-13 to 76-17.) Nothing in the agreement precludes the Parents from raising the issue - non-provision of services during the entire period - in the administrative due process forum. (NT 79-14 to 81-9.)

Burden of Proof

The District moved for a determination that the burden of proof is upon the Parents pursuant to Pennsylvania law. (NT 13-17 to 16-15; HO-3 p. 2 to 7.) The District maintained that the hearing officer should be guided by the United States Supreme Court's decision in Schaffer v. Weast, __ U.S. __, 126 S.Ct. 528 (2006), even though the holding in Schaffer is limited to special education cases under the IDEA, and therefore does not govern proceedings under Pennsylvania's statute and regulations establishing a student's right to gifted services. Ibid.

The Parent argued that the burden of proof in special education cases should be upon the District, for four reasons. First, Pennsylvania case law has assigned the burden to school districts in special education cases. (HO-7.) Second, there is an imbalance of access to information and expert knowledge that falls heavily in favor of school districts. Ibid. Third, in the instant matter, the District has demonstrated a pattern of denying access to information about their gifted services. (HO-7.) Fourth, there are impediments to enforcement of students' rights to gifted special education services that need to be considered in the calculus inherent in allocating the burden of proof. (NT 17-3 to 24; HO-7.)

The hearing officer determined that the burden of persuasion should be allocated to the Parents. (NT 75-5 to 7.) First, the hearing officer found no governing legal authority. (NT 66-23 to 69-6.)² Second, he determined that the general rule, including in administrative hearings, is that the party seeking relief has the burden of proof. (NT 69-7 to 71-4, 73-6 to 9.) See In re Educational Assignment of A.H., Spec. Educ. Op. 1787 (2006)(general rule is that party asserting or pleading a fact has the burden of persuasion). Guided by the analysis in Schaffer, the hearing officer found insufficient reason to shift the burden to the District. (NT 70-14 to 73-22.) Third, the hearing officer heard evidence on the allegation that material documentary evidence had been withheld, (NT 39-5 to 65-3), and found to the contrary, (NT 65-8 to 23.) Fourth, he determined that the Parents’ policy arguments were not cognizable in an administrative hearing. (NT 73-23 to 75-4.)

The District’s Obligation to Provide Gifted Special Education

Chapter 16 of the Pennsylvania Code defines Gifted Education in language that tracks the standard for special education for children with disabilities:

Gifted education—Specially designed instruction to meet the needs of a gifted student that is:

* * *

- (vi) Individualized to meet the educational needs of the student.
- (vii) Reasonably calculated to yield meaningful educational benefit and student progress.
- (viii) Provided in conformity with a GIEP.

22 Pa. Code §16.1. The Appeals Panel has pointed out that this standard requires districts to provide, not a maximum opportunity, but a “reasonable” one. In re Educational Assignment of A.S., Spec. Educ. Op. 1616 n. 26 (2005). The Department of Education Basic Education Circular, Special Education for Gifted Students, 22 Pa.Code Chapter 16 (March 26, 2003) emphasizes that a gifted program must be individualized and, must provide a “reasonable” opportunity for meaningful progress:

Specially designed instruction for gifted students may result in the adaptation or modification of the general curriculum, including compacting learning experiences, accelerating the student, or placing the student in more than one grade level. Specially designed instruction may also have an impact on instructional environments, methods, and materials. Districts should be aware that the use of extra work, peer tutoring, or helping the teacher does not constitute specially designed instruction or gifted education, and Advanced Placement or

² But see, In re Educational Assignment of A.H., Spec. Educ. Op. 1787 (2006)(allocating burden of persuasion in gifted case to parent requesting due process).

Honors courses are not in and of themselves gifted education if they do not respond to the gifted student's individual needs.

Gifted education must be individualized programming that addresses the gifted learner's need for acceleration, enrichment, or both to accommodate the student's individual academic abilities. Gifted programming must be "reasonably calculated to yield meaningful educational benefit and student progress". (22 Pa. Code §16.1(vii)).

In the instant matter, the Parent is exercising her right to due process to resolve her claim that the District failed, not in the identification of the Student as gifted - which they did - nor in the provision of a GIEP that is "reasonably calculated to yield meaningful educational benefit and student progress" as required above – which they provided with the Parents' agreement.

The sole issue then is whether or not the District provided the services they offered, sufficient that the Student received in fact the "meaningful opportunity" undisputedly offered by the District. In assessing whether or not such offered opportunity was delivered, the hearing officer will be guided by principles developed by the courts and the Appeals panels under the IDEA. In re Educational Assignment of A.H., Spec. Educ. Op. 1787 (2006)(many components of IDEA can be imported to gifted cases); accord, In re Educational Assignment of A.S., Spec. Educ. Op. 1616 (2005). It is basic law in IDEA cases, which the hearing officer applies by analogy to this gifted matter, In re Educational Assignment of B.C., Spec. Educ. Op. 1604 at 8 (2005), that procedural defaults by a district will not be considered a deprivation of the services required by law if they do not result in an actual denial to the Student. Cf In re Educational Assignment of B.T., Spec. Educ. Op. 1577 (2006)(in IDEA case, procedural errors not denying FAPE are deemed "harmless error" not giving rise to a compensatory education remedy, citing Commonwealth Court decisions). Therefore, this hearing officer will not look to perfect technical compliance with the procedural terms of the GIEP, but will assess whether or not educational opportunity itself was denied by the District's non-compliance with its own offer of services. Mere procedural violations without more are harmless error. B.T., supra. However, substantial non-compliance with the substantive terms of the prevailing offer of services –whether the prevailing GIEP or the Pendency Agreement which served a similar purpose – will be deemed to be a denial of the meaningful opportunity required by Pennsylvania law, because the parties have agreed that these substantive terms define that legal standard for the period in which they are in force.

The Parents argue that the quality of the gifted services provided by the District must be judged in light of the Student's potential. (NT 118-7 to 119-15.) The hearing officer recognizes that the District's legal obligation under the Pennsylvania regulations, described in terms of what is "reasonable", Educational Assignment of A.S., supra., should be judged in light of the student's potential, which the evidence showed to be very superior. (FF 1.) Nevertheless, the hearing officer finds this argument inapplicable to the facts of this case, because the issue is limited to implementation of the prevailing GIEP. The qualitative sufficiency of the District's offer of services, embodied in the prevailing GIEP, is not at issue.

The District's Provision of Gifted Enrichment Activities

Mathematics Under the Prevailing September 2005 GIEP from September 5, 2006 to October 26, 2006

The prevailing GIEP for the beginning of the school year (from September 5, 2006 to the date of the Pendency agreement on October 16, 2006) was the September 2005 GIEP. (FF 1, 2, 3.) This contained a mathematics goal for instruction in fractions, decimals, computation and mathematics fluency. (FF 9, 10.) There was no evidence that the District defaulted in this duty; on the contrary, there was evidence that the District provided both testing and instruction to the Student in fractions, decimals and computation. (FF 11, 12.) Thus, the hearing officer does not find that the District failed to implement this portion of the prevailing GIEP.

Creative Problem Solving and Research Explorations Under the September 2005 and November 2006 GIEPs

The September 2005 GIEP and the October 26, 2006 pendency agreement both required, as did the November 2006 GIEP, that the District provide enrichment activities in creative problem solving. (FF 24, 25, 26.) There is ample evidence that these requirements were implemented throughout the 2006-2007 school year. (FF 27, 28, 34, 40.)

The Parents suggested that the District unreasonably delayed the provision of services after the Parents agreed to the November 2006 GIEP. The hearing officer finds that there was no unreasonable delay. The starting date for assessing the District's timeliness must be the signing of the NORA on November 20, 2006, because before then, the District had no certainty that the Parents were in agreement with the terms of the GIEP. Although the Student's gifted education program was still being put together as late as early December, (FF 5, 6, 7, 8), the District provided enrichment activities to the Student pursuant to the November 14, 2006 GIEP in the first two weeks after the Parents signed the NORA. (FF 8, 27, 28, 39.) In language arts, the teacher began a writing project called Turkey Talk beginning in early December. (FF 20.) The Student continued to participate in the creative problem solving activities that had begun early in the year. (FF 27, 28, 34.) In research techniques, the gifted special education teacher assigned the first steps of a research project in social studies. (FF 52, 59.) Thus, the District's implementation of the November 2006 GIEP was timely.

The Student's gifted education was coordinated by the gifted special education teacher. (FF 7, 8.) A conflict arose between this teacher and the Student's mother, which was the basis for many of the Parents' claims in this matter. (FF 28, 32, 33, 34.) The Parents alleged that the teacher failed to comply with some of the detailed specifications of the November 2006 GIEP, and that when the Student's mother complained, the teacher retaliated against the Student by segregating her from the rest of her gifted peers for her creative problem solving project, telling her that this was done at

the Parents' request. In addition, Parents imply that the teacher subsequently failed to provide adequate supervision to the Student in her research explorations activity in retaliation for the Parents' complaints.

The hearing officer recognizes that there was a conflict and that the teacher's decisions did temporarily disrupt the Student's progress in her creative problem solving and research explorations activities. (FF 29, 32, 34, 52, 53, 54.) The hearing officer carefully assessed this teacher's demeanor and the content of his testimony to determine his credibility in denying responsibility for any disruption whatsoever. The hearing officer finds that the teacher was essentially credible, although he also finds that some of the testimony was defensive and perhaps understandably so, given the allegations against him and the tenor of the communications between him and the Parents. This defensiveness reduces the weight given to the teacher's depiction of the degree of supervision provided to the Student in her research explorations activities. When considered in light of the documentary record, which constitutes contemporaneous evidence that the Student was without effective supervision for a significant number of days in the latter half of January and the first week of February (FF 52, 53, 54), the hearing officer concludes that the teacher failed to provide adequate supervision during this time, despite his protestations to the contrary. (FF 52, 53, 54.)

On the other hand, the spontaneous enthusiasm and command of fact with which the teacher described his provision of gifted services to the Student convinced this trier of fact that the teacher was truthful in his depiction of the Student's participation in - and progress as a result of - the creative problem solving and research exploration activities; the documentary record supports this finding as well. (FF 59, 60, 69, 70, 73, 76.) The teacher's answers on these subjects were not defensive and were both detailed and for the most part accurate. Thus, the hearing officer relies upon the teacher's depiction of the Student's participation in, and progress as a result of, the teacher's services.

The hearing officer also assessed the credibility of the Student's mother, who testified and who presented the case for the Parents. The hearing officer also finds this witness to be essentially credible. The Student's mother demonstrated a command of the facts and good recall. Her demeanor was direct, businesslike and not at all defensive. However, the hearing officer repeatedly observed a tendency to characterize events in inaccurately negative terms, perceiving nonfeasance based upon lack of information given to her, and malfeasance based upon negative actions of the District that were otherwise peripheral to their overall implementation of the prevailing GIEP requirements. This appeared to arise from an attitude of protectiveness of her daughter, but it reduced the weight to be accorded to her testimony, insofar as the testimony related her perception of the meaning of events.

The hearing officer finds that the Student did participate in, complete, and learn from the School Store creative problem solving project. (FF 27, 28, 34, 40.) Over the school year, the Student developed a greater ability to work independently, and developed greater analytical skill. (FF 27, 28, 34, 40.) The gifted education teacher graded the Student according to a rubric, which was conveyed to the Parents as required by the GIEP. (FF 30, 31, 33, 34, 35, 36, 38.) The teacher provided progress reports to the Parents, as required. (FF 37, 38, 39.) The hearing officer finds that there may have been two or three instances during the school year in which the Student did not participate with other children in the gifted education teacher's instruction for creative

problem solving. (FF 29, 32.) However, these events did not undermine the overall services provided beyond a de minimis level.

Likewise, the hearing officer finds that the Student did receive instruction in research techniques and did complete research projects in both social studies and science. (FF 48 to 50, 58, 60 to 67, 72 to 74.) The teacher's testimony and the documentary record show that the Student made reasonably meaningful progress in research techniques over the course of the school year. (FF 72 to 74.) The projects were assessed according to a rubric that was provided to the Parents as developed, and progress reports were provided, according to the GIEP. (FF 68 to 71, 73, 75, 76.) The Parents' complaint that they do not have documentation of these services does not outweigh the credible evidence that the services were provided. Moreover, the weight of the credible evidence contradicts their assertion that the District failed to address the deficiencies in the research explorations class from December 5, 2006 to April 18, 2007. (FF 52 to 54, 56, 57.) Any failure to comply with all of the details of the GIEP, (FF 74), was de minimis.

The hearing officer finds it significant that the District recognized the problem and took steps to correct it. (FF 52 to 54, 56, 57.) Essentially, the District reassigned the language arts teacher to provide supervision on the research projects. (FF 54.) The evidence shows that this correction put the Student back on track with her projects, and that she completed them successfully. (FF 61 to 67, 71, 73, 74.)

Language Arts Under the November 2006 GIEP

With regard to language arts, the District complied with its obligations as defined in the November 2006 GIEP. The language arts teacher provided enrichment activities. (FF 15 to 18, 20 to 23.) The teacher provided rubrics and progress reports as required, (FF 19, 20, 21); indeed, this teacher made substantial efforts to keep the Parent informed of the Student's lesson plans and progress in gifted activities. (FF 20.)

The Parents argued that the language arts teacher failed to provide the Student with appropriate enrichment activities under the November 2006 GIEP because most of the assignments were given to the entire class. (NT 403-24 to 404-22.) This did not negate the advanced nature of the assignments given. The language arts class consisted of a mixture of gifted and non-gifted students. (FF 16, 18, 21.) Enrichment activities were assigned that addressed the individual needs of the Student. (FF 18.) This is all that the GIEP required. (FF 15.) The configuration of these services was at the discretion of the District.

The Parents argued that the language arts teacher failed to provide for the Student's individual needs because the enrichment activities that she provided were no more than her customary differentiated teaching. This argument is beside the point. The language arts teacher credibly testified that she provided enrichment in accordance with the Student's individual needs, and that the Student's differentiated activities were enrichment for the Student. (FF 16, 18, 20 to 22.) The fact that other students participated in some of the activities does not detract from or contradict this testimony.

The Parents argued that the District failed to implement the November 2006 GIEP because the teacher did not provide any documentation that enrichment activities were provided and assessed at the seventh grade level. (FF 21.) This was not a failure to implement for three reasons. First, the GIEP primarily requires that the Student

“complete” at least some enrichment activities as described, and this was accomplished. (FF 15.) The evidence shows that not all activities appropriately called for rubrics and formal assessment. (FF 21.) Second, the teacher credibly testified that she did assess some activities at the seventh grade level. (FF 17, 18, 21.) Third, the Parents tried to prove the absence of assessment rubrics from the fact that they did not receive them; however, they did receive at least one such rubric, (FF 20), and there could be many reasons that they did not have such rubrics in their possession at the time of trial. Thus, their proofs failed to sustain their argument.

*Reading Under the September 2005 and November
2006 GIEPs and the October 2006 Pendency Agreement*

The September 2005 GIEP provided reading goals and required enrichment activities including reading self selected novels, the opportunity to participate in a Junior Great Books program and the opportunity to work on a challenge spelling list. (FF 41.) The Pendency Agreement of October 2006 essentially extended the self selected novel requirements until the November 2006 GIEP was signed, specifying assessment at the seventh grade level. (HO-3 p. 11 to 12.) No direct evidence was presented by either party to address all of these requirements for the period from September 5, 2006 to October 26, 2006. The Student did read books from the Junior Great Books program. (FF 42.) There was no evidence that the Student was reading self selected novels or that she was given the spelling enrichment called for in the GIEP. The only reference to implementation of these requirements was the Student’s mother’s testimony that she heard nothing and received no documentation about the implementation of any of these reading enrichment requirements. (NT 456-11 to 18.)

While this absence of documentation can fairly raise a somewhat weak inference of non-implementation, given all the other documentation of the Student’s activities in the record, the hearing officer finds that this inference is insufficient to prove non-implementation. The GIEP assigned the gifted education teacher some discretion in whether or not to assign extra reading assignments. (P-1 p. 4, 5.) The gifted education and language arts teachers testified that not every paper related to every activity was sent directly to the Parents as a matter of custom and practice. (FF 21, 76.) Thus, the fact that a parent did not have documentation is not necessarily the result of non-implementation. Moreover, the Student did in fact work on the Junior Great Books program in the 2006-2007 school year. (FF 41.) The hearing officer finds the Student’s testimony to this effect credible, based upon her demeanor and its corroboration by her mother under oath. (FF 41.) This admission by the Student undercuts the Parents’ premise that the lack of documentation in their hands proves the lack of implementation. Moreover, it proves that the Student did receive at least part of the services required under the September 2005 GIEP. Given the paucity of conflicting evidence on this issue, the hearing officer finds that the evidence is in “equipoise”. The Parents have the burden of persuasion; evidence in “equipoise” is insufficient to meet their burden. Schaffer v. Weast, U.S. ___, 126 S.Ct. 528 (2006). Therefore, the hearing officer does not find a failure to implement this part of the September 2005 GIEP.

The District complied in substance with the requirements of the November 2006 GIEP in reading. The GIEP requires the District to address the Student’s needs in the

areas of comprehension, inference and character, and assessment at the seventh grade level. (FF 43.) The District provided testing, in which the Student reached her goals. (FF 44, 47.) The language Arts teacher provided a novel for seventh grade level readers. (FF 45.) The Parents challenged the grade level of this novel on grounds that it was listed as part of the sixth grade curriculum, (P-36); however, the hearing officer accepts the language arts teacher's credible assertion that the novel is at the seventh grade level of difficulty and gives that statement greater weight than the mere appearance of the book title in the current sixth grade curriculum, without expert testimony to provide a reliable explication of the significance of its listing in the curriculum. (FF 45.)

Leadership and Interpersonal Skills

Although the Parents included claims on this issue, they did not introduce any evidence about it, nor did they press this issue during the due process hearing. Therefore, the hearing officer finds no evidence that the District failed to implement any applicable GIEP requirements on this issue. (FF 13, 14.)

Retaliation

The Parents alleged that the treatment of the Student in separating her from other gifted students on three occasions, (FF 29), and in certain marking decisions (evidence of which was excluded as irrelevant) amounted to retaliation against their daughter. Without condoning these actions by District staff, the hearing officer finds that the evidence does not rise to the level of retaliation, and did not have a substantial adverse impact upon the Student's learning.

Training

The Parents requested relief in the form of an order that the District train its educational staff in the educational needs of gifted students. However, the hearing officer finds no cause to issue such an order. (FF 77 to 79.)

CONCLUSION

In sum, the hearing officer finds that the District did not fail to implement the GIEP documents, contrary to the Parents' allegations. Consequently, there is no cause to award compensatory education to the Student.

ORDER

1. From September 5, 2007 through October 27, 2006, the District did not fail to provide appropriate special education services in accordance with the prevailing GIEP with regard to mathematics through enrichment activities.
2. From September 5, 2007 through October 27, 2006, the District did not fail to provide appropriate special education services in accordance with the prevailing GIEP with regard to leadership/interpersonal skills.
3. During the 2006-2007 school year, the District did not fail to provide appropriate special education services in accordance with the prevailing GIEP with regard to language arts and creative writing, through enrichment activities assessed at the seventh grade level during language arts classes.
4. During the 2006-2007 school year, the District did not fail to provide appropriate special education services in accordance with the prevailing GIEP with regard to creative problem solving, through instruction in and use of a problem solving rubric.
5. During the 2006-2007 school year, the District did not fail to provide appropriate special education services in accordance with the prevailing GIEP with regard to reading.
6. During the 2006-2007 school year, the District did not fail to provide appropriate special education services in accordance with the prevailing GIEP with regard to research techniques, through work on two research projects during classroom time.
7. Compensatory education shall not be awarded.
8. The hearing officer will not order the District to train its employees with regard to the education of gifted students.

June 30, 2007

William F. Culleton, Jr.

WILLIAM F. CULLETON, JR., ESQ.
HEARING OFFICER