

***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.***

IN THE PENNSYLVANIA OFFICE FOR DISPUTE RESOLUTION

**Final Decision and Order**  
ODR File No. 2916-1112KE

**OPEN HEARING**

Child's Name: R.C.<sup>1</sup>  
Date of Birth: [redacted]

Hearing Dates:  
April 19, 2012  
April 24, 2012

Parties to the Hearing

Representative

Parents

*Pro se*

State College Area School District  
154 West Nittany Avenue  
State College, PA 16801

Brian K. Marshall, Esquire  
Campbell, Miller, Williams, Benson, Etter  
& Consiglio, Inc.  
720 South Atherton Street  
State College, PA 16801

Record Closed: April 24, 2012  
Date of Decision: May 21, 2012

Hearing Officer: Brian Jason Ford

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<sup>1</sup> Although this is an open hearing, other than this caption, the child and parents names are not used to protect their privacy. "Parents" and "Student" is used instead.

## **INTRODUCTION AND PROCEDURAL HISTORY**

The Parents bring this case against the District, alleging various violations of Pennsylvania's gifted education law, 22 Pa. Code § 16 *et seq.* (Chapter 16). In their initial Complaint, the only relief that the Parents demanded was the Student's placement in their preferred Math class. The District unconditionally agreed to place the Student into the demanded class, rendering the original complaint moot. A number of pre-hearing motions followed, resulting in the Parents' submission of an Amended Complaint. The District then moved to dismiss a portion of the Amended Complaint and, to the extent that the Parents demanded relief beyond my authority to provide, that motion was granted. The remaining issues were specified in pre-hearing orders, stated clearly during the opening of this hearing, and are described immediately below.

### **ISSUES**

1. Did the District violate the Student's rights under Chapter 16?
2. If the District violated the Student's rights under Chapter 16, is the Student entitled to compensatory education as a remedy?
3. Is the Student entitled to a gifted individualized education plan (GIEP)?

### **CREDIBILITY DETERMINATIONS**

In general, all witnesses testified credibly. This is not to say that all witnesses were in agreement, or that the testimony of each witness was given equal weight. Rather, each witness told the truth as she or he perceives it.

During the hearing, the Parents spent an inordinate amount of time challenging the credibility of witnesses who were either employed by or associated with the District. These attacks focused on what the Parents perceive to be inconsistencies in various evaluations, and a generalized accusation that the District's personnel had an interest in maintaining the Student's Math placement despite parental objections. The Student's evaluations and the way in which they were used are described below. For purposes of credibility, I find that District personnel were anxious about the Student's evaluations, but did not inappropriately influence or alter test results.<sup>2</sup>

The testimony from the District's Superintendent and Assistant Superintendent, both of whom were called by the Parents, was not probative. The Superintendent was and is not *directly* involved with the Student's education or with these proceedings. The Assistant Superintendent is involved only in the most tangential way (he offered to

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<sup>2</sup> The anxiety about the Student's evaluation is apparent in emails between teachers, school administrators, and evaluators. The evidence in this case should stand as an object lesson to school personnel: emails concerning students are, more likely than not, student records. Some care, therefore, should be taken when choosing the wording of such emails.

mediate this dispute before this hearing convened, but has no knowledge of the dispute itself). As their testimony has no probative value, it is not cited in this decision.

Similarly, the testimony from a parent of another student in the District was not probative. The other parent, who was called by the Parents (ostensibly to provide information regarding the District's policies and how those policies are implemented) was generally unaware of the District's policies and shared information about her own families' circumstances. Those circumstances were more different than similar to the circumstances of the Student and Parents in this case.

Despite some internal inconsistencies, the Student's testimony was particularly candid and forthright. This bright, insightful, [pre-teenaged student] understood the importance of answering truthfully. As importantly, when the Student did not know the answer to a question, [the Student] said so. The Student used [the Student's] own words to speak [the] truth, no matter who was asking the questions.<sup>3</sup> [The Student's] poise under stressful circumstances was beyond [the Student's] years.

## **FINDINGS OF FACT**<sup>4</sup>

### **The District's Experimental Program**

1. Historically, the District had a very high rate of gifted students.
2. The District developed and adopted a complex and comprehensive program for learning enrichment (LE) and gifted education in 1987 (the 1987 Plan). (S-8, pp. 1-52)<sup>5</sup>
3. The 1987 Plan describes three tiers of LE classes and services. *Id.*
4. Under the 1987 Plan, all tiers of LE classes and services are considered to be *regular education* interventions.<sup>6</sup> *Id.*
5. The 1987 Plan also has provisions for gifted education. Specifically, those students who are in need of enrichment and/or acceleration beyond what can be provided

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<sup>3</sup> I am compelled to note the careful and appropriate way in which the District's counsel cross-examined the Student. The line between zealous advocacy and over-aggressively challenging a child is a fine one. Mr. Marshall walked that line well. An equal compliment must be paid to the Student's father, who showed both love and appropriate self-restraint when challenging some of the Student's testimony.

<sup>4</sup> A large amount of evidence was presented in this case. All entered evidence was carefully considered, but not all evidence is referenced herein. Those documents that are not referenced were technically admissible during the hearing, but were ultimately not probative to the rather precise issues presented in this case.

<sup>5</sup> In their closing statement, the Parent posits that the District's descriptions of its learning enrichment program are a direct, defensive response to the instant litigation. During the hearing, however, the District's terminology was consistent with the 1987 Plan.

<sup>6</sup> Portions of the 1987 Plan describe learning enrichment as regular education with additional enrichment. But even those portions of the 1987 Plan draw a clear line between learning enrichment and gifted education, specifying that learning enrichment is part of regular education in the District. See S-8 at 43

through the District's LE classes and services are expected to receive programming through a GIEP.<sup>7</sup> *Id.*

6. Since the adoption of the 1987 Plan, the number of students in the District with GIEPs has dropped from historically high numbers to one or two. (NT at 439-440)
7. The one or two students in the District who currently have GIEPs came to the District with GIEPs. They are expected to have GIEPs only until the District determines whether they can be served through LE classes and services. No student in the District currently has a GIEP issued by the District. *Id.*
8. In 2009, the District applied to the Pennsylvania Department of Education (PDE) for recognition of the 1987 Plan as an "experimental program." (S-10) Experimental programs are contemplated in Chapter 16 at 22 Pa. Code § 16.3.<sup>8</sup>
9. PDE approved the District's experimental program application in 2009, and has annually renewed that approval every year since, through the present. (S-10)
10. Although the District's PDE-approved experimental program (Experimental Program) is not a verbatim resection of the 1987 Plan, they are substantively identical. As such, the District's characterization of all LE classes and services as *regular education* was approved.

### **The Student's Math Placement and Placement Options**

11. During [the Student's] second and third grade years, the Student received LE Math through a "pull out" model on a once-per-week basis (i.e. students were removed from their ordinary Math class once per week to receive math enrichment in a small group).
12. At the second and third grade level, the pull out Math class is considered to be a Tier 2 *regular education* intervention. This description is consistent with the 1987 Plan and the Experimental Program. (NT at 435; S-8, S-10)
13. The Student participated in the Tier 2 pull out LE Math program in second and third grade. (NT at 53-54)
14. During the Student's fourth and fifth grade years, [the Student] was placed in "Advanced Math." Advanced Math is a regular education Math class. As the name implies, the District also offers less advanced Math classes at the fourth and fifth grade levels. (See NT at 258)
15. Although testimony on this point is somewhat confused, I find that the Advanced Math class is a Tier 1 LE Math class and, per the terms of the 1987 Plan and the Experimental Program, is a *regular education* class.
16. In fourth and fifth grades, the District also offers a once-per-week pull out Math class. As in second and third grade, that class is considered to be a Tier 2 intervention. (NT at 435)

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<sup>7</sup> Gifted education terminology has changed as Pennsylvania's gifted education laws have changed. Historical references to the provision of gifted programming through an IEP (as opposed to a GIEP) have been updated to make this decision easier to read and understand.

<sup>8</sup> Testimony and evidences suggests that the District applied to have the 1987 Plan recognized as a Chapter 16 experimental program in response to a 2009 audit by PDE. (See S-9) The underlying reason why the District submitted the 1987 Plan is, however, irrelevant. What is relevant is that at all times pertinent to this case, the 1987 Plan was approved by PDE as a Chapter 16 experimental program.

17. The pull out Math class in fourth and fifth grade is made up of students who take Advanced Math.
18. The Student did not participate in the pull out Math class for the entirety of [the Student's] fourth grade year or for the majority of [the Student's] fifth grade year.
19. The District unilaterally and unconditionally moved the Student into the Tier 2 pull out Math class shortly before this hearing convened. The Student has received Advanced Math with the once-per-week pull out class since that time.
20. As a result of the foregoing, the District changed the Student's placement from Tier 2 to Tier 1 LE Math at the start of fourth grade. The District, at the Parents' request, then changed the Student's placement from Tier 1 to Tier 2 just before this hearing started. These are changes from one *regular education* program to another *regular education* program, and back again.
21. As noted, the District considers all LE Math programs at all tiers and in all grade levels to be *regular education* interventions. This is consistent with the 1987 Plan and the Experimental Program. (S-8, S-10)
22. The Student has never had a GIEP, and the District did not convene a GIEP team meeting before changing the Student's placement from Tier 2 to Tier 1. (See *generally*, NT at 453-458)
23. No information was provided to the Parents regarding the differences between the Math programs that the Student received in third and fourth grade. *Id.*
24. In fourth grade, the Student was aware of the fact that some members of the Advanced Math class were being pulled out but that [the Student] was not being pulled out. The Student perceived this as a change because [the Student] was pulled out in third grade. (See *generally* NT at 55-60)
25. The Student recalled that at the start of fourth grade, the Advanced Math teacher told the Advanced Math class that the students who were pulled out were receiving the same instruction as the rest of the class, and that the purpose of pulling some students out was to create two smaller groups to focus on advanced work.<sup>9</sup> *Id.*
26. Eventually, the Student did come to realize that the students who were being pulled out were receiving a higher level of Math enrichment than [the Student] was receiving.<sup>10</sup>

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<sup>9</sup> The Student's testimony about what [the Student] told [the] parents when [the Student] perceived a change in placement at the start of fourth grade is too contradictory to be reliable. The Student's testimony regarding how the perceived change in placement made [the Student] feel is also contradictory, but less so. See NT at 55-60. The most likely scenario is that the Student was comfortable with the change until [the Student] came to understand that the students in the pull out class were at a higher level. When the Student came to that realization, [the Student] felt bad. These contradictions in no way diminish the Student's remarkable testimony. More importantly, neither fact is determinative in this case. Chapter 16, when applicable, prescribes what notice school district must provide Parents. Those provisions are not changed depending on what students do and do not tell their families. Further, the appropriateness of programming under Chapter 16 is not predicated on whether any student's feelings will be hurt if and when a change in placement occurs.

<sup>10</sup> Taken in its entirety, the Student's testimony reflects that [the Student] came to this realization sometime in fifth grade.

## Evaluations / Placement Demands / GIEP Request

27. On PSSA Math evaluations, the Student scored “proficient” in third grade and “advanced” in fourth grade. (NT at 653)
28. Starting in November of 2011 and ending in January of 2012 (the Student’s fifth grade year), the Parents and District participated in a series of meetings during which the Parents expressed their desire for the Student to participate in the Tier 2 pull out class. (NT at 369, 377, 430, 634)
29. The District refused the Parents’ request during this series of meetings.
30. The final meeting in this series convened on January 28, 2012.
31. The District interpreted the Parents’ request as a demand to move the Student from one *regular education* placement to another, and to complete whatever testing would facilitate the change. The District did not interpret the Parents’ request to be a demand for evaluations to determine eligibility under Chapter 16. (NT at 431, 506)
32. To educators familiar to the 1987 Plan and the Experimental Program, the District’s interpretation of the Parent’s request is reasonable.
33. The Parents were unfamiliar with the 1987 Plan, the Experimental Program and Chapter 16 in November of 2011. (*See generally* NT at 453-487)
34. I find that between November of 2011 and January of 2012, the Parents demanded that the District place the Student in the Tier 2 Math pull out class, but never requested evaluations for Chapter 16 eligibility. Whatever language they used during the meetings, the Parents’ purpose was to secure placement in the Tier 2 class – their purpose was not to obtain a Chapter 16 evaluation or secure a GIEP.<sup>11</sup>
35. In February of 2012, the Parents became familiar with Chapter 16 through their own research.
36. On February 28, 2012, the Parents, via email, demanded a GIEP. The District interpreted this email as a request for a Chapter 16 eligibility determination and treated the meeting on January 28, 2012 as the start of Chapter 16’s 60-day evaluation timeline. (NT at 431; P-3, pp. 12-13)
37. The District, through appropriately trained and qualified personnel, then completed several evaluations and prepared a Gifted Written Report (GWR). (S-13 pp. 5-14, S-14) The evaluations included:
  - a. Weschler Intelligence Scale for Children-IV (WISC-IV)
  - b. KeyMath-3 Diagnostic Assessment (KeyMath-3)
  - c. Woodcock Johnson Test of Achievement – Third Edition (Woodcock Johnson)
  - d. Gifted Evaluation Scale - Third Edition (GES-3)
38. The GWR also considered results of MAP tests, which are math tests administered to all students in the Advanced Math class. The results of the Student’s MAP test place the Student “close to or above other students who are already in LE math.” (S-13 p. 6)

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<sup>11</sup> During the hearing, the Parents suggested that it was disingenuous for District administrators to make the Parents use “magic words” before conducting a Chapter 16 evaluation. To be clear, no magic words are required to trigger the District’s obligation to evaluate a student’s potential giftedness. In this case, however, the District correctly determined that the Parents were making a specific placement demand. Per the terms of the 1987 Plan and the Experimental Program, the Parents were demanding a change in the Student’s regular education program and were not demanding anything else.

39. The WISC-IV revealed that the Student has a full scale IQ of 130. (S-14)
40. On the KeyMath-3, the Student scored in the 98th percentile, meaning that the Student's math performance was better than 98% of the normative sample. The normative sample is intended to represent all students of all abilities. (S-14)
41. The GES-3 is a rating scale completed by the Student's teachers. It is not math-specific, but rather rates the Student's characteristics associated with giftedness (intellect, creativity, academic aptitude, leadership, and artistic ability). Teachers rated the Student in the 60 to 67th percentile compared to other students in the Advanced Math class.<sup>12</sup> (S-13 pp. 8-9)
42. There is conflicting testimony about what various sub-tests in the Woodcock Johnson actually measure, and whether the Woodcock Johnson is an accurate indicator of the Student's math ability. This discrepancy notwithstanding, the Student was in the 98th on this assessment as well. (S-13)
43. A review of curriculum-based assessments, grades (an "A" in the first quarter of fifth grade and a "B" in the second)<sup>13</sup> and teacher input revealed that the Student was performing on par with other fifth grade students who were taking Advanced Math without the Tier 2 pull out. (S-13)
44. Based on the results of the GWR, the District issued a Notice of Recommended Educational Assignment (NORA), concluding that the Student was ineligible for gifted programming and did not require a GIEP because the Student was not in need of specially designed instruction. (H-4)

### **DISCUSSION AND CONCLUSIONS OF LAW**

Although Chapter 16 does not speak to the burden of proof in gifted due process proceedings, it has been clearly established 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 rests with the Parents.

As a threshold matter, analysis is required to determine if the Student is a "gifted student" as defined in Chapter 16.

In Pennsylvania, gifted students are entitled to the substantive rights and procedural protections of Chapter 16. "Gifted student" is, however, a term of art with a particular meaning, defined at 22 Pa. Code § 16.1. Specifically, a gifted student is a school aged

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<sup>12</sup> A considerable portion of the Parents' examination of various witnesses was intended to highlight discrepancies between the Student's very strong performance on normative assessments like the KeyMath-3 and teacher ratings on the GES-3 that place the Student in the average range. This apparent discrepancy was explained many times by several witnesses. Normative testing compares the Student to a large sample of students with a wide range of abilities. Various rating scales completed by teachers compare the Student to other students who were taking both the Advanced Math class and the Tier 2 pull out. It is not at all surprising that the Student scored very well compared to "typical" students represented by a normed sample, but was average compared to [the Student's] cohort of Math aces. The Parents' suggestion that the Student's lower scores on rating scales that compare [the Student] to [the Student's] cohort tarnish the teachers' credibility is unfounded.

<sup>13</sup> The Parents argue in their closing statement that the Student's performance in school compared to [the Student's] performance on standardized tests indicates that [the Student's] needs were not met. There is no evidence in the record to support this hypothesis.

student “who ... meets the definition of “mentally gifted” ... and needs specially designed instruction beyond that required [by Pennsylvania’s regular education regulations].” *Id.*

As such, Chapter 16 creates a two-part test to determine if a student is a “gifted student.” First, the student must be mentally gifted. Second, the student must require specially designed instruction. Both “mentally gifted” and “specially designed instruction” (or SDI) are terms of art that are defined in Chapter 16.

Chapter 16 includes two definitions of “mentally gifted.” The first is found at 22 Pa. Code § 16.1: “*Mentally gifted*—Outstanding intellectual and creative ability the development of which requires specially designed programs or support services, or both, not ordinarily provided in the regular education program.” That definition is somewhat unhelpful, as it mostly restates the two-part test found in the definition of “gifted student.” What is far more helpful is the description of the criteria that school districts must use to determine if a student is mentally gifted. Those criteria are found at 22 Pa Code § 16.21(d):

Each school district shall establish procedures to determine whether a student is mentally gifted. This term includes a person who has an IQ of 130 or higher or when multiple criteria as set forth in this chapter and in Department Guidelines indicate gifted ability. Determination of gifted ability will not be based on IQ score alone. Deficits in memory or processing speed, as indicated by testing, cannot be the sole basis upon which a student is determined to be ineligible for gifted special education. A person with an IQ score lower than 130 may be admitted to gifted programs when other educational criteria in the profile of the person strongly indicate gifted ability. Determination of mentally gifted must include an assessment by a certified school psychologist.

*Id.* The next sub-section, 22 Pa. Code § 16.21(e) goes on to list the multiple criteria indicating giftedness, but that is not relevant here. The Student’s full scale IQ is 130 and, by definition, [the Student] is mentally gifted.

With the first part of the test satisfied, the question becomes whether the Student requires specially designed instruction. Specially designed instruction is defined as, “Adaptations or modifications to the general curriculum, instruction, instructional environments, methods, materials or a specialized curriculum for students who are gifted.” 22 Pa. Code § 16.1

Under ordinary circumstances, the Student would require specially designed instruction. The Student’s teachers and school administrators testified, credibly, that the Math instruction provided in both the Advanced Math and Tier 2 pull out class uses adaptations and modifications of a general curriculum; and that the curriculum itself is specialized for students with very strong Math abilities. (See, e.g. NT at 121, 151, 166-67, 678) The Student’s teachers and school administrators also testified that the Student was appropriately placed in the Advanced Math class. (See, e.g. NT at 176)



Under a normal Chapter 16 analysis, this testimony is tantamount to an admission that the Student receives specially designed instruction and needs the specially designed instruction that [the Student] receives, satisfying the second part of the eligibility test.

The circumstances of this case, however, are not ordinary or normal. The 1987 Plan and the Experimental Program take programs that would be specially designed instruction and converts those programs into regular education. The adapted, modified, specialized Math program that the Student receives is, per the terms of the Experimental Program, not specially designed instruction. Rather, it is a part of the District's general, regular education curriculum.

PDE "may approve exceptions to [Chapter 16] for the operation of experimental programs..." 22 Pa. Code § 16.3. Chapter 16 gives PDE the authority to approve, review and terminate experimental programs. *Id.* Chapter 16 does not give standing to any individual or entity to challenge PDE's approval of a school district's experimental program. Even if Chapter 16 did confer such standing to the Parents in this case, the Parents do not challenge the Experimental Program itself. As a result, all of the Math programs that the Student has received must be considered *regular education* and not specially designed instruction.

To illustrate the significance of this point, it is noted that everything from attending college classes to studying the performing arts in New York are all considered to be regular education interventions. Particularly at higher grade levels, the District's Director of Learning Enrichment was unable to conceive of any program or service that would not be considered a regular education intervention. NT at 439-440. Similarly, the District's Director of Learning Enrichment was unable to conceive of any circumstances under which a student would require a GIEP. *Id.* Although the Director of Learning Enrichment's testimony stands in sharp contrast with ordinary Chapter 16 analysis, it is consistent with the terms of the 1987 Plan and the Experimental Program.

Under the terms of the Experimental Program, the Student's fourth and fifth grade teachers testified that the Student's needs were met in an unmodified, regular education class (i.e. Advanced Math). As importantly, it is the Parents position that the Student should have been placed in another unmodified, regular education class (i.e. Advanced Math with the Tier 2 pull out). Even though the District ultimately acquiesced to the Parents' placement demand, the Parents did not present persuasive evidence that the Student requires anything other than the District's regular education program – as defined in the 1987 Plan and approved through the Experimental Program.

Placement preferences notwithstanding, the Student's Father testified that the Student should have a GIEP because such a document would require greater collaboration between the Parents and the District before any subsequent change in the Student's placement, and would trigger pendency in the event of a future dispute. (See NT at 495-96, 502-504). Yet it is the Student's Chapter 16 eligibility that triggers the protections that the Parents hope to secure, not a GIEP itself. To receive Chapter 16's protections, students must first satisfy the two-part eligibility test. In this case, the second part of that

test is not satisfied because there is no evidence or testimony in the record suggesting that the Student requires anything more than what is deemed to be regular education in the District.

In sum, while the student is quite “gifted” as that term is used colloquially, the Student is not a “gifted student” as that term is defined in Chapter 16. Although the Student is mentally gifted, [the Student] is not in need of specially designed instruction. The reason why the Student is not in need of specially designed instruction is that the 1987 Plan, combined with the Experimental Program, takes what would otherwise be specially designed instruction and converts that to regular education. This considerable deviation from ordinary Chapter 16 analysis is required because the Experimental Program was properly approved in conformity with 22 Pa. Code § 16.3. There is no authority that would allow the Parents to challenge that approval, and they have not done so.

The Student and Parents are not entitled to the substantive rights or procedural protections of Chapter 16 because the Student does not meet the statutory definition of a “gifted student” as that term operates under the Experimental Program. All three issues presented in this case, therefore, can be addressed simply.

First, the District did not violate the Student’s rights under Chapter 16 because the Student is not a “gifted student” and because the District conducted an evaluation in accordance with Chapter 16 requirements when such an evaluation was requested.

Second, the Student is not entitled to compensatory education because the District did not violate the Student’s rights.

Third, the Student is not entitled to a GIEP because the Student is not a “gifted student.”

### **CONCLUSION**

The District’s 1987 Learning Enrichment Plan categorizes interventions that would otherwise be considered specially designed instruction as regular education. The 1987 Plan was approved as an Experimental Program in accordance with 22 Pa. Code § 16.3. As a result, the Student is mentally gifted but not in need of specially designed instruction. Chapter 16’s two-part eligibility test is, therefore, not satisfied, and the Parents are not entitled to the relief that they demand.

An order consistent with the foregoing follows.

## **ORDER**

And now, May 21, 2012, it is hereby order as follows:

1. The District did not violate the Student's rights under Chapter 16.
2. Compensatory education is not owed.
3. The Student does not require a GIEP.

It is **FURTHER ORDERED** that nothing in this Decision and Order is intended to exempt the District from its obligation to evaluate the Student in the event that it ever comes to suspect that the Student is gifted and in need of specially designed instruction, per 22 Pa. Code § 16.21(a).

It is **FURTHER ORDERED** that nothing in this Decision and Order is intended to preclude the Parents from exercising their right to request, in writing, a gifted multidisciplinary evaluation of the Student at any time, with a limit of one request per school term, per 22 Pa. Code § 16.22(c).

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

/s/ Brian Jason Ford  
HEARING OFFICER