

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

Pennsylvania
Special Education Hearing Officer

DECISION

Child's Name: R.M.

Date of Birth: [redacted]

Dates of Hearing: July 8, 2008

OPEN HEARING

ODR#8988/07-08 KE

Parties to the Hearing:

Representative:

Parents

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Date Record Closed: July 16, 2008
Date of Decision: July 28, 2008
Hearing Officer: Daniel J. Myers

INTRODUCTION AND PROCEDURAL HISTORY

[Student] (Student) ¹ is a gifted 6th grade Student who complains that his/her gifted individualized education programs (GIEPs) for the last two years have been inappropriate. Student seeks 1080 hours of compensatory education and assignment to a particular math class. For the reasons described below, I find that Student's claim is limited to one year, I agree with Student that Student has been denied appropriate gifted programming for the last year, but I order a different remedy than that suggested by Student.

ISSUES

- Whether the School District has provided Student an appropriate gifted education?
- Whether Student's complaint may extend further than one year before the due process hearing request ?
- Whether Student is entitled to placement in the accelerated math class?

FINDINGS OF FACT

1. Student, whose date of birth is [redacted], is a resident of the Kennett Consolidated School District (School District). Student will enter 6th grade next year and move from the School District's elementary school building to its middle school building. Student has been identified since 3rd grade (2005-2006) as needing gifted education programming, with strengths in verbal comprehension,

¹ All future references to [Student] will be generic and gender-neutral. These impersonal references to Student are not intended to be disrespectful but rather to protect his/her confidentiality.

- math reasoning, perceptual reasoning, working memory and reading comprehension. (P1, p.4; SD2) ²
2. In 3rd (2005-2006) and 4th (2006-2007) grades, Student's regular classroom was a gifted cluster classroom, which contained "homogenous" (i.e., gifted) and "heterogeneous" (i.e., non-gifted) students so as to create a learning environment with Student's intellectual peers as well as with typically developing, non-exceptional, chronological and grade-based peers. Student also attended math classes with students of similar, higher-level math ability. (N.T. 29-30, 35, 38-39, 81, 135) The School District's gifted education program was a "push-in" program, in which the classroom teacher was expected to differentiate instruction at different levels for each student, and a gifted education teacher provided two hours per week of "pull-out" enrichment instruction in reading and math. (N.T. 29-30, 35, 38-39, 81, 138)
 3. In 5th grade (2007-2008), Student's regular classroom was still a gifted cluster classroom, but Student no longer attended math classes with students of similar, higher-level math ability because no such ability-grouped math class is provided in this School District for 5th grade students. (NT. 49-50, 81) Despite a request from Student's parent at the October 2007 GIEP team meeting for math programming for 5th grade, the School District did not include it in Student's 5th grade GIEP because the School District does not provide such instruction in 5th grade. (N.T. 50)

² References to "P" and "SD" are to the Parent's exhibits and School District's exhibits, respectively. References to "N.T." are to the transcript pages of the July 8, 2008 hearing.

4. When Student enters middle school for 6th grade (2008-2009), Student will be assigned to homogenous classrooms for reading, language arts and social studies, with no more than 20 students, all of whom will be higher level intellectual peers. (N.T. 151, 156, 172)
5. The School District's middle school offers a 6th grade accelerated math class. (N.T. 53-54) Enrollment is limited to the top quintile, or top 20%, of all of the School District's 5th graders, as determined by a formula derived from a child's grades, Pennsylvania System of School Assessment (PSSA) scores, and 4Sight scores (which are described in greater detail below). (N.T. 100; SD22) For some reason that was not explained at the hearing, only 25 of the School District's 315 fifth graders (8% rather than the top quintile) qualified for the 2008-2009 6th grade accelerated math class. (N.T. 110) Because Student was not one of the 25 qualifiers, the School District will not enroll Student in the 6th grade accelerated math class. (N.T. 54-55)
6. Student's November 16, 2006 (4th grade) GIEP listed four goals: a) To develop higher order thinking skills: b) To develop research projects and share them in oral, written and/or electronic forms: c) To develop leadership skills and take on variety of roles in cooperative groups: and d) To use proper research techniques in completing assignments. (SD14)
7. Student's October 26, 2007 (5th grade) GIEP contains three previous GIEP goals (higher order thinking skills/ research projects/ and leadership skills) and replaces the goal to use proper research techniques with a new goal to develop products of the high quality of which Student is capable. (P4, p.6) In addition, because the

- School District does not provide accelerated math instruction in 5th grade, the specially designed instruction (SDI) in Student's previous GIEP requiring ability-grouping for math instruction was removed from the October 2007 GIEP. (P2, p.10; P4, p.8; N.T. 149-150)
8. School District officials do not believe that all annual goals must be measurable and, in fact, are not sure whether Student's goal relating to higher order thinking skills can be measured. (N.T. 165-166)
 9. On February 9, 2007, when Student was in 4th grade, Student's parents obtained a School and College Ability (SCAT) test that places Student in the 48th percentile in reading compared to 6th graders, and in the 71st percentile in math compared to 6th graders. (P11; SD2; N.T. 89-90)
 10. School District officials do not know Student's present levels of educational performance in math and reading, either in terms of a comparison against a nationally normed group or in terms of a comparison against curriculum benchmarks in any curriculum other than in Student's present grade level curriculum. (N.T. 170-171) The only nationally normed present educational levels for Student that the School District has are a March 2005 (3rd grade) Kaufman Test of Educational Achievement (KTEA). (P4; SD16)
 11. Student's 5th grade (2007-2008) GIEP lists his present levels of academic achievement as: a) The 3rd grade KTEA scores; b) "does well" with individualized reading and writing projects and enrichment spelling; c) "has been successful" with organizers, rubrics, chunking assignments and preferential seating; d) Performs at high academic levels but does not always perform to his ability; e)

Higher order thinking skills “are evident;” f) “Needs to continue” in higher order thinking skills, presentation skills using electronic media, and leadership skills; and g) Tends to lower expectations by settling for inadequate products that need to be redone at least once if not twice due to failure to refer to rubric associated with certain projects resulting in a lower grade. (P4, p.2; SD16, p.2)

12. At the July 8, 2008 due process hearing, School District witnesses supplemented Student’s present levels with the following information:

- a. In math, Student worked well within an extremely academically talented 5th grade math group but did not always perform at the same level as the other children. (N.T. 135, 137, 144-145) Student’s math needs are to express math abilities more. Student had a hard time with complex word problems and with certain applications. (N.T. 176-176)
- b. In writing, Student does not exhibit “a lot of depth” compared to Student’s academically talented peers. (N.T. 137) Student’s problem with writing was in synthesizing, pulling it all together, making it make sense, using appropriate grammar and punctuation. (N. T. 178) Student “has trouble with” punctuation, usage, verb/subject usage. (N.T. 137) Compared with other gifted children, Student works at a lower level in projects, and has different skills and different writing abilities than Student’s gifted peers. (N.T. 134-135)
- c. In research projects, Student was “getting better” with the tendency to stare at PowerPoint presentation rather than focusing on the audience. (N.T. 146)

- d. In leadership, Student is very gracious, willing to take a back seat, and be a gentle guide if needed; Student does not need to be the center of attention. (N.T. 134) Student does need to gain confidence in a group. (N.T. 176)

13. Student's parents believe that Student can handle the pace of math in accelerated math groups. (N.T. 60-61, 63-64) They believe Student's reading comprehension is 99%, and that Student requires above-grade level reading material. (N.T. 61) They believe that Student needs study skills for college. (N.T. 91) They believe that School District is not sufficiently challenging Student because Student receives As in school without having to study at home, and Student reported being bored at school, which allegedly was confirmed by disruptive talking during class. (N.T. 29-30, 35, 52, 59-60, 80)

14. On June 17, 2008, Student's parents requested a due process hearing, challenging the School District's determination that Student did not qualify for the 6th grade accelerated math class. (P6, pp.2-3; N.T. 59, 185) On June 29, 2008, Student's parents amended their due process complaint, adding claims for two years of compensatory education relief and requesting an order that Student be placed in the 6th grade accelerated math program and for "partial grade skipping" in other, unspecified subjects so that Student receives a more advanced level of instruction. (P7, p.5; N.T. 63-64, 186)

15. On July 8, 2008, I conducted a due process hearing, determining that I would conclude the hearing in one evening, despite the School District's objections that it did not have all of the witnesses that it needed to defend against Student's

amended complaint. (N.T. 184) Parent exhibits P1-P22 were admitted into the record. (N.T. 189-190) School District exhibits SD1-SDS27 were admitted into the record. (N.T. 189-190)

16. Student argues that this claim for compensatory education should be permitted to extend more than one year before the date of the June 17, 2008 due process hearing complaint because the School District did not have the appropriate personnel at GIEP team meetings, and because Student's parents never received procedural safeguards. (N.T. 128) I find that GIEP team composition has nothing to do with any failure by Student's parents to file earlier for due process. I further find that Student's parents have signed numerous documents on multiple occasions over the years that either explicitly refer to the existence of procedural safeguards or explicitly allow Student's parents to request mediation or a due process hearing if they do not approve the School District's recommendations. (P3,p.14; P5, p.2; SD1, p.1; SD5, p.2; SD7; SD8, p.2; SD10, p.2; SD11, p.2; SD12, p.2; SD13, p.2; SD14, p.2; SD15, p.1; SD17, p.2; SD18, p.2; SD19, p.20, p.2) Because Student's parents appeared at the due process hearing to be sufficiently capable of understanding the documents they were signing (N.T. 128), I conclude that any lack of actual Procedural Safeguards does not constitute mitigating circumstances warranting an expansion of the one year compensatory education period.

DISCUSSION AND CONCLUSIONS OF LAW

Gifted education cases are governed by rules contained in Chapter 16 of the State Board of Education's regulations. 22 Pa. Code §16.1 et seq. The general principle in

civil proceedings within the Commonwealth places the burden of proof on the person who initiates the action. In Re: A.H. v. Haverford Township School District, Appeals Panel Opinion No. 1787 (Dec. 20, 2006) Therefore, the burden of proof, and more specifically the burden of persuasion, in this case rests upon Student's Parents, who initiated the due process proceeding. A GIEP must be individualized and not the one-size-fits-all type that has led to difficulties in previous Chapter 16 cases. See, e.g., Centennial Sch. Dist. v. Pennsylvania Dep't of Educ., 539 A.2d 785 (1988); York Suburban Sch. Dist. v. S.P., 872 A.2d 1285 (Pa. Commw. Ct. 2005); In Re: Z.S. v. West Chester Area School District, Appeals Panel Opinion No. 1748 (July 10, 2006)

Claims regarding the appropriateness of GIEPs are limited to one year prior to the filing of a due process hearing request, except where mitigating circumstances permit one additional year. B.C. v. Penn Manor School District, 906 A.2d 642 (Pa. Cmwlt. 2006); Carlynton School District v. D.S., 815 A.2d 666 (Pa. Cmwlt. 2003); Montour School District v. S.T., 805 A.2d 29 (Pa. Cmwlt. 2002) In this case, Student argues that this claim for compensatory education should be permitted to extend more than one year before the date of the June 17, 2008 due process hearing complaint because the School District did not have the appropriate personnel at GIEP team meetings, and because Student's parents never received procedural safeguards. (N.T. 128) I have found that GIEP team composition has nothing to do with any failure by Student's parents to file earlier for due process and that Student's parents have signed numerous documents on multiple occasions over the years that either explicitly refer to the existence of procedural safeguards or explicitly allow Student's parents to request mediation or a due process hearing if they do not approve the School District's recommendations. (P3,p.14; P5, p.2;

SD1, p.1; SD5, p.2; SD7; SD8, p.2; SD10, p.2; SD11, p.2; SD12, p.2; SD13, p.2; SD14, p.2; SD15, p.1; SD17, p.2; SD18, p.2; SD19, p.20, p.2) Thus, because Student's parents appeared at the due process hearing to be sufficiently capable of understanding the documents they were signing (N.T. 128), I conclude that any lack of actual Procedural Safeguards does not constitute mitigating circumstances warranting an expansion of the one year compensatory education period. Student's claim is limited to the period of June 17, 2007 and forward.

A GIEP can be inappropriate where it fails to report current instructional levels, curricular content unmastered, or other information that could be used to establish the student's level of educational performance within the curriculum, even though that GIEP does provide some information about the Student's attainment in reading and mathematics. In Re: D.D. v. North Penn School District, Appeals Panel Opinion No. 1791 (Jan. 9, 2007) Present levels of educational performance must enable a School District to determine an appropriate place to start instruction. Said another way, the present educational levels should indicate the content mastered by the student and the content in which the student requires instruction. In Re: A.H. v. Haverford Township School District, Appeals Panel Opinion No. 1787 (Dec. 20, 2006) Further, GIEP goals that use such general terms as "will enhance ability to develop a paragraph..." and "will continue the study of ..." lack the requisite qualities necessary for objective measurement. In Re: D.D. v. North Penn School District, Appeals Panel Opinion No. 1791 (Jan. 9, 2007)

One of the problems in this case is that, although Student has four GIEP goals in the areas of higher order thinking skills/ research projects/ leadership skills/ and the

development of products “of the high quality of which Student is capable” (P4, pp.3-7), no one can articulate, in objective terms, Student’s actual level of educational performance in any of these areas. (N.T. 170-171) Student’s higher order thinking skills “are evident” and “Needs to continue.” (P4, p.2) In research projects Student “does well” (P4, p.2), “has been successful” with organizers and rubrics (P4, p.2), and “was getting better” with respect to the tendency to stare at the PowerPoint presentation. (N.T. 146) In leadership, Student is very gracious, willing to take a back seat, be a gentle guide if needed, does not need to be the center of attention, and does need to gain confidence in a group. (N.T. 134, 176) In development of products, Student submits projects that need to be redone “at least once if not twice” (P4, p.2), does not exhibit a lot of depth compared to Student’s academically talented peers (N.T. 137), and “has trouble with” punctuation, usage, verb/subject usage. (N.T. 137) These descriptions do not indicate either the content mastered or the content in which the student requires instruction, nor do these descriptions explain the appropriate place to start instruction. In Re: A.H. v. Haverford Township School District, Appeals Panel Opinion No. 1787 (Dec. 20, 2006)

Another problem in this case is that Student’s GIEP goals do not match perceived needs. Although the triggering event in this case involves Student’s placement or exclusion from the 6th grade accelerated math class, Student’s GIEP does not even contain a math-related goal! Further, even if there was a math goal in Student’s GIEP, there is insufficient information upon which to determine Student’s present educational levels of performance in math. At most, the School District knows through the 4Sight test, in any given year, Student’s present levels of educational performance in that year’s grade level curriculum – but the School District does not know Student’s present levels of

educational performance in any other grade level of its K-12 math curriculum. Further, a School District witness testified that Student had a hard time with complex word problems and with certain applications (N.T. 176-176), needs to express math abilities more (N.T. 176-176), and worked well within an extremely academically talented 5th grade math group but did not always perform at the same level as the other children. (N.T. 135, 137, 144-145) This gives no indication of the content mastered, the content in which instruction is required, and the appropriate place in the School District's K-12 math curriculum where instruction should begin. Another perceived need, at least from the parents' perspective, for which there is no GIEP goal is study skills. Student's parents have a benchmark, at least in their minds, relating to cracking books at home, reporting boredom, and talking during class. (N.T. 29-30, 35, 52, 59-60, 80) If this is a gifted education need, the GIEP team must discuss it, determine appropriate benchmarks, and develop goals designed to reach those benchmarks.

A third problem in this case is that Student has been receiving a one-size-fits-all gifted education program. The classic example of this is the fact that, despite having no math-related goal, Student was placed in ability-grouped math classes for 3rd and 4th grades, but not in 5th grade – not because Student either did, or did not, need an ability-grouped math class in any of those grades, but simply because the School District provides ability grouped math classes for 3rd and 4th grades, but not for 5th grade. This due process complaint was filed this summer, again despite the fact that Student's GIEP has no math-related goal and not because Student has particular math-related needs that are identified as being unmet, but simply because Student was not permitted to enroll in a particular math class. Ironically, even the relief requested in this case is a one-size-fits-

all solution and, because no one has a clear picture of Student's present levels of educational performance in math, is not based upon the unique needs of the Student.

A fourth problem in this case is that the four goals in Student's 5th grade GIEP are not written so as to be measurable. School District officials do not believe that all annual goals must be measurable and, in fact, are not sure whether Student's higher order thinking skills goal can be measured. (N.T. 165-166) In fact, it is possible to first identify the elements of higher order thinking, such as problem solving, critical thinking, value analysis, and hypothesis testing, then to describe in objective terms (e.g., % correct, time required to complete, etc.) how Student currently performs in each of those elements, and then to describe in the same objective terms where Student is expected to perform in each of those elements in one year. This may not be an easy task for the GIEP team, but many other school districts do it and technical assistance is available from the Commonwealth as well.

Thus, I conclude that the School District has not provided Student with appropriate gifted education programming since June 1, 2007. This is because: 1) Student's GIEPs since that time have lacked appropriate levels of educational performance in any of the four goal areas; the four goals in Student's GIEPs were not written so as to be measurable; Student's GIEP goals did not match his needs as perceived by either the School District or Student's parents; and Student was provided a one-size-fits-all gifted education program.

The remedy requested by Student is placement in the 6th grade accelerated math class, unspecified partial grade skipping, and 1,080 hours of compensatory education services. Student's requests for placement in a particular class and for partial grade

skipping, however, are no more based upon Student's present levels of educational performance than is Student's current, inappropriate GIEP. They are simple one-size-fits-all solutions to the deficits of the School District's one-size-fits-all program.

What is required, and what I will order, is an evaluation of Student's present levels of educational performance in all present and suspected areas of gifted educational need. This shall include objective testing of Student's higher order thinking skills, leadership skills, research skills, writing skills, study skills and, of course, math skills. The GIEP team shall then convene to develop measurable goals for each area of gifted educational need, first listing Student's present levels of need in objective and measurable terms, and then using those same objective and measurable terms when developing goals for Student in each area of need. In developing Student's GIEP goals, the GIEP team must describe the actual chart(s) that will be used for monitoring and recording Student's progress on each goal.

With regard to compensatory education, the remedy for denial of an appropriate gifted education is not the hour-for-hour standard proposed by Student, but rather an amount of compensatory education reasonably calculated to bring Student to the position that Student would have occupied but for the school district's failure to provide an appropriate program. This may require awarding the student more compensatory education time than a one-for-one standard would, while in other situations the student may be entitled to little or no compensatory education, because (s)he has progressed appropriately despite having been denied a FAPE. B.C. v. Penn Manor School District, 906 A.2d 642 (Pa. Cmwlth. 2006)

In a case that appears similar to this case, the Appeals Panel awarded, under the Penn Manor standard, one hour for every day that the student attended school from the start of the previous school year until the District offered a revised GIEP. In Re: A.H. v. Haverford Township School District, Appeals Panel Opinion No. 1787 (Dec. 20, 2006) This appears to be an appropriate remedy in this case as well. I believe one hour per day of compensatory education is reasonably calculated to bring Student to the position that Student would have occupied if the School District had provided a more systematic gifted education program that was uniquely tailored to Student's specific needs.

Finally, the School District vigorously objected at the July 8, 2008, due process hearing to conduct the hearing in one evening despite the School District's assertion that it did not have all of the witnesses that it needed to defend against Student's amended complaint. (N.T. 184) I note, however, that the critical factual findings and legal conclusions in this decision are based upon the documentary record, and unavailable witnesses could not have produced more appropriate GIEPs at the due process hearing.

CONCLUSION

The School District has denied appropriate gifted education to Student since June 17, 2007 as a result of inappropriate levels of educational performance, unmeasurable goals, a one-size-fits-all gifted education program, and a lack of correlation between Student's perceived gifted education needs and his GIEP goals. Student's claims are limited to one year, because Student's parents have not demonstrated the mitigating circumstances necessary for claims greater than one year. As relief, I will order an evaluation of Student's needs, a new GIEP, and one hour per day of compensatory education for the period from June 17, 2007 to the date of the new GIEP.

ORDER

- The School District has denied appropriate gifted education to Student since June 17, 2007;
- By August 28, 2008, the School District shall evaluate Student's present levels of educational performance in all present and suspected areas of gifted educational need. This shall include objective testing of Student's higher order thinking skills, leadership skills, research skills, writing skills, study skills and math skills.
- By September 10, 2008, the School District shall convene Student's GIEP team to develop measurable goals for each area of gifted educational need, first listing Student's present levels of need in objective and measurable terms, and then using those same objective and measurable terms when developing goals for Student in each area of need. In developing Student's GIEP goals, the GIEP team must describe the actual chart(s) that will be used for monitoring and recording Student's progress on each goal.
- The School District shall provide to Student one hour per day of compensatory education for the period from June 17, 2007 to the date of the new GIEP.

Compensatory education must be a service that is already available in the District; however, its timing shall be determined by the Parents and may be after school or during the summer.

Daniel J. Myers

Daniel J. Myers
HEARING OFFICER

Date of Decision: July 28, 2008
Date of Mailing: July 28, 2008