

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

Pennsylvania Special Education Hearing Officer

DECISION

Child's Name: Student

Date of Birth: [redacted]

ODR No. 01867-10-11-KE

OPEN HEARING

Parties to the Hearing:

Representative:

Pro Se

Council Rock School District
30 North Chancellor Street
Newtown, PA 18940

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Date of Hearing: January 7, 2011, February 15, 2011,
February 25, 2011

Record Closed: March 18, 2011

Date of Decision: April 2, 2011

Hearing Officer: William F. Culleton, Jr., Esquire

INTRODUCTION AND PROCEDURAL HISTORY

The captioned Student is an eligible resident of the captioned District, (NT 12-19 to 25), and is in elementary school, (NT 11-23 to 12-15). The Student is identified as a gifted child, within the meaning of 22 Pa. Code Chapter 16 (Special Education for Gifted Students). (NT 12-17 to 25.) The captioned Parents request due process, asserting that the Student's Gifted Individualized Education Plans (GIEPs) and the gifted educational programs delivered to the Student for the 2009 – 2010 and 2010-2011 school years were inappropriate. (NT 32-17 to 33-12.) The District asserts that it provided an appropriate GIEP.

This matter was heard in three sessions and the record closed upon receipt of written summations.

ISSUES

1. Did the District fail to provide an appropriate gifted education program to the Student during the relevant period from December 7, 2009 to January 7, 2011?
2. Should the hearing officer order the District to provide compensatory education for any such failure during all or any part of the relevant period?
3. Should the hearing officer order any other equitable relief with regard to the Student's gifted education program?

FINDINGS OF FACT

1. When the Wechsler Intelligence Scale for Children, Fourth Edition was administered to the Student in May 2007, the Student's IQ was found to be in the very superior range, at the 99th percentile. Student's vocabulary and comprehension were at the highest possible level in the relevant sub-tests. (J-1.)¹
2. This evaluation found that the Student's rate of acquisition was above average, and Student's memory was strong. Student's comprehension was advanced at times and Student displayed higher level abstract thinking skills and fluid reasoning. (J-1.)
3. Student achieved on or above grade level in every area. (J-1.)
4. Student was an advanced reader, had advanced abilities in computation and quantitative reasoning, and excels in school work. Student was a self motivated learner. (J-1.)
5. Student did not make friends easily and needed to develop social skills. (J-1.)
6. The evaluation found that the Student would benefit from greater challenge in the academic curriculum, assistance with social skills and encouragement to help others and share ideas with them. (J-1.)
7. Mathematics pre-testing for placement in mathematics enrichment indicated that the Student did not qualify for the 2009-2010 school year, but did qualify for the 2010-2011 school year. (NT 995-18 to 996-10; J- 2 p. 6; S-16.)
8. On June 10, 2009, the District offered a GIEP for the next school year. Present levels of Educational Performance listed in narrative form numerous strengths and some areas rated as "satisfactory." Only one need was listed: socialization and leadership. Performance data were provided for reading, writing, word recognition, and mathematics, and the fourth grade teacher subsequently took these scores into consideration in designing classroom activities for the Student in accordance with the GIEP. (NT 507-14 to 508-17; J-2.)
9. The District placed the Student in Gifted Support, which consisted of one pull out gifted class per day that served as the Student's Humanities class. (NT 210-19 to 211-15, 319-16 to 320-10; J-2.)
10. The GIEP provided goals for higher level learning, requiring two projects in social studies; oral communication, requiring one project; socialization and leadership, requiring two group activities; creativity, requiring two projects; research skills, requiring one project; and self-directed learning, requiring self-reflection. Attainment of designated learning outcomes was assessed through

¹ The documentary record consists of Joint Exhibits (denominated "J") and District Exhibits (denominated "S").

completion of the projects, subjective teacher assessments rubrics and a checklist. (J-2.)

11. Goals were not written for each subject area; however, specially designed instruction (SDI) were tailored to specific subjects, including mathematics and science. (NT 353-19 to 360-6; J-2.)
12. The GIEP provided SDI to be implemented both in the gifted support placement and in regular education classes, including individual and small group instruction in the District's gifted program; differentiated assignments; supplemental materials; enrichment opportunities; modeling; pre-testing in mathematics for purposes of compacting the regular curriculum; independent writing assignments, self-selection of reading materials; and modification of curriculum. All SDI was aimed at developing and challenging the Student to use higher level thinking skills, oral and written expression skills, research and study skills, and appropriate affect and social skills, including leadership skills. Higher level skills to be addressed included analysis, synthesis and evaluation. Affect was addressed by encouraging the Student to decline extra assignments and express discomfort with challenging materials. SDI included pairing with appropriate peers and meeting with parents as requested. (J-2.)
13. The GIEP was created with the assistance of a computer GIEP-writing program that was structured to utilize drop down menus to a great extent, especially in the goals section; the GIEP team was constrained to write customized, original narrative, not in the goals area, but in the SDI area. The team did write customized, original narrative in the SDI area of the GIEP in order to individualize the GIEP for the Student. (NT 326-9 to 329-25.)
14. The Parents approved the June 2009 GIEP by signing the form on June 18, 2009. (J-2.)
15. During the relevant period, the Student's gifted support and regular education teachers were aware of Student's level of mastery of the curriculum through quarterly assessments, computer records of performance data, pretesting and curriculum based testing and quizzes. The teachers tried to keep the Student appropriately challenged. Compacting of curriculum was available in the gifted pull out class and in other classes. (NT 233-17 to 234-3, 324-20 to 326-8, 371-15 to 374-7, 383-1 to 20, 390-2 to 391-17, 517-15 to 521-14, 530-9 to 531-3, 533-17 to 534-22, 679-20 to 685-9, 634-18 to 642-25, 645-5 to 647-17, 414-10 to 415-10, 969-14 to 970-15; S-13.)
16. District practice is to measure progress in higher level thinking skills through day to day assessments in the classroom and teacher judgment based upon analysis of written products. District staff are unaware of a practice of measurement and progress reporting based on data collected for specified narrow behaviors and skills. (NT 939-15 to 943-21.)

17. The mathematics curriculum to which the Student was assigned was fast paced. (NT 641-1 to 642-25.)
18. During the 2009- 2010 school year, the Student was absent 32 to 34 times, mostly due to illness, and was late or signed out 21 times. Student missed approximately 40 science periods. (NT 503-5 to 506-13, 603-2 to 22; J-4, J-6.)
19. Student made progress in development of higher level thinking skills and demonstrated mastery of the fourth grade curriculum in the 2009-2010 school year and the 2010-2011 school year. (NT 233-14 to 234-3, 315-20 to 317-25, 654-7 to 655-22, 669-22 to 679-12, 773-10 to 13, 961-7 to 966-21, 975-6 to 15; J-3 p. 6, 7, J-4.)
20. On September 30, 2010, the District offered a GIEP for the 2010-2011 school year. Present Levels included assessment data on grade level functioning and achievement in reading, writing, mathematics and higher level thinking skills. Acquisition and retention were reported subjectively and descriptively; acquisition was reported to be fast and memory was at a high level. Analytical, evaluative and comprehension skills were reported subjectively and descriptively as advanced. Learning, higher level thinking, creativity and work characteristics were listed in detail. (J-3.)
21. The District placed the Student in Gifted Support, which consisted of one pull out gifted class per day that served as the Student's Humanities class. Student also was assigned to mathematics enrichment, a pull out class two days per week. (NT 319-16 to 320-10, 997-12 to 998-21; J-3.)
22. Parents participated in the development of the GIEP through written input and conversation prior to the meeting, and during the meeting. (J-3, S-10, 11.)
23. The GIEP offered goals addressing fund of information, memory, making comparisons, analysis, synthesis, interpreting surveys, graphs and other data presentation methods, summarizing, explaining, imaginative activities, abstract thinking strategies, inquisitiveness, resilience, metacognition, leadership, class discussion, and meeting or exceeding standards. Attainment of objectives was to be assessed by the teacher or by self reflection. (NT 727-17 to 728-19; J-3.)
24. SDI were added, including flexible grouping in mathematics, extending science units with independent reading, guided independent study in science and language arts, methodological assistance for projects, problem based learning, weekly meetings with teachers and staff meetings with Parents. (J-3, S-12.)
25. The fifth grade science curriculum is inquiry based, so that it is not possible to pretest for mastery of each unit of the curriculum. The Student therefore was required to proceed through the curriculum with the rest of the class. The teacher

assessed the Student's mastery of the material as the Student proceeded through the curriculum. (NT 888-4 to 891-25.)

26. During the 2010-2011 school year, the gifted and regular education teachers provided the Student with differentiated enrichment activities, including science activities. These enrichment activities included opportunities to take on leadership and team facilitation roles, related to the goals involving leadership and class discussion. (NT 456-25 to 458-25, 836-19 to 837-16, 888-4 to 891-25, 997-12 to 1007-25.)
27. In the 2010-2011 school year, the Student was encouraged to create interactive note books for each subject, to be used during class time when the Student had mastered the material or finished assignments ahead of time, or during pre-arranged independent study times. However, classes were managed so that very little class time was available for this activity. In addition, the Student was to use the notebooks only after mastery of assigned curriculum, and Student needed most of the available class time to master the curriculum. (NT 866-11 to 872-9, 883-9 to 888-2; S-1.)
28. The Student did participate in journaling and blogging in the Humanities classroom, the gifted pull out classroom. These activities challenged Student's higher level thinking in literary analysis, creativity and inquisitiveness, abstract thinking, working with other students and taking risks by putting ideas out to the rest of the class. Student evidenced utilization of these higher level skills and motivation to take risks in this class. (NT 268-8 to 280-19; S-17, 18.)
29. In the 2010-2011 school year, language arts was taught using a journal and open ended questions that encouraged the use of higher level thinking skills. In language arts and science, the teacher differentiated the Student's journal through prompts, comments and questions to address the Student's educational needs arising from giftedness. (NT 773-14 to 774-13, 803-17 to 814-22; S-8, S-9 p. 2, S-19.)
30. The Student's progress report for the first quarter of the present school year provides numerical scores in a range of one to four for "Characteristics of a Successful Learner and Achievement Indicators." Student was graded on a variety of traits of a successful learner for each subject being taught. Specific grades were reported for critical thinking skills, discussion and presentation skills, and listening skills. The Student was given the highest possible score in each graded trait. Narrative notes reported that the Student helped others in the classroom, worked on "enrichment papers", shared thoughts with the classroom, and displayed some humor. (J-5.)
31. Student's performance in reading and writing was graded by teacher judgment using rubrics with pre-determined criteria. Progress was not systematically

measured through scores from objective testing instruments. (NT 551-3 to 554-2, 945-10 to 946-20; S-13.)

32. In the 2010-2011 school year mathematics, the teacher pretested the Student's class in every skill being taught in the mathematics curriculum. Students then were allocated to one of two groups, depending on mastery of the appropriate skill. One group worked with the teacher to achieve mastery, and the other group worked on problems requiring higher level thinking skills and enrichment activities, based upon pre-selected published workbooks. (NT 730-24 to 737-20; S-2.)
33. For each new skill in the mathematics curriculum, Student was given the opportunity to proceed through the regular education curriculum at an accelerated pace for that skill, and then to use the remainder of instructional time for enrichment activities until a new skill was introduced. Compacting was available also in the gifted pull out class. (NT 324-20 to 326-8, 551-3 to 554-2, 652-1 to 653-4.)
34. One of the Student's teachers was hesitant to challenge the Student because of the significant amount of time Student had missed in the previous year due to sickness. (NT 603-2 to 604-13.)
35. In one instance, using higher level thinking skills including creativity and humor, Student created an algebra game and presented it to the class. (NT 744-15 to 745-17; S-3.)
36. Creative writing assignments included editing by the teacher in a way that emulates the editing function of a commercial publisher. The Student was given the opportunity to enter a writing contest. During this process, the Student experienced some difficulty expressing disagreement with the teacher. (S-5, 6, 14.)
37. Science was taught with a problem solving approach that emulates the scientific method. Enrichment activities were provided. (NT 764-18 to 778-25, 945-12 to 946-10; S-4.)

DISCUSSION AND CONCLUSIONS OF LAW

BURDEN OF PROOF

The burden of proof is composed of two considerations, the burden of going forward and the burden of persuasion. Of these, the more essential consideration is the burden of persuasion, which determines which of two contending parties must bear the

risk of failing to convince the finder of fact.² The United States Supreme Court has addressed this issue in the case of an administrative hearing challenging a special education IEP. Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005).

The IDEA and Shaffer v. Weast do not govern here, but the Shaffer decision is instructive, since it emphasizes that the general rule places the burden on the party requesting relief. In Pennsylvania, this general principle is applied in civil proceedings. In Re: A.H. v. Haverford Township School District, Appeals Panel Opinion No. 1787 (Dec. 20, 2006). Under the general rule, the moving party must produce a preponderance of evidence³ that the District failed to fulfill its legal obligations as alleged in the due process Complaint Notice. See, L.E. v. Ramsey Board of Education, 435 F.3d 384, 392 (3d Cir. 2006).

In Weast, the Court noted that the burden of persuasion determines the outcome only where the evidence is closely balanced, which the Court termed “equipoise” – that is, where neither party has introduced a preponderance of evidence to support its contentions. In such unusual circumstances, the burden of persuasion provides the rule for decision, and the party with the burden of persuasion will lose. On the other hand, whenever the evidence is preponderant (i.e., there is greater evidence) in favor of one party, that party will prevail. Schaffer, above.

Therefore, in this matter, the burden of proof, and more specifically the burden of persuasion, rests upon Student’s Parents, who initiated the due process proceeding. If the

² The other consideration, the burden of going forward, simply determines which party must present its evidence first, a matter that is within the discretion of the tribunal or finder of fact (which in this matter is the hearing officer).

³ A “preponderance” of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. Dispute Resolution Manual §810. In this decision, I refer to “preponderant” evidence, which is a quantity or weight of evidence that is at least great enough to constitute a “preponderance” of evidence.

evidence is in “equipoise”, or if it is preponderant in favor of the District, the Parents will not prevail.

EQUITABLE LIMITATION PERIOD

In Montour Sch. Dist. v. S.T., 805 A.2d 29 (Cmwlth Ct. 2002), the Pennsylvania Commonwealth Court held that there is an equitable limitation period of one year for complaints filed for exceptional children under the Individuals with Disabilities Education Act, 20 U.S.C. §1400 *et seq.* (IDEA). The Court specifically held that this limitation period starts running upon the parent’s acceptance of an IEP. The Court premised its reasoning upon federal law. The Court in Carlynton Sch. Dist. v. D.S., 815 A.2d 666 (Pa. Cmwlth. 2003) held that the rule in Montour applies to compensatory education cases involving gifted education. See B.C. v. Penn Manor Sch. Dist., 906 A.2d 642, 648 (Pa. Cmwlth 2006). Each of these cases recognizes an exception to the limitation period, extending it to two years in cases in which there is a showing of some equitable, mitigating reason to extend the time period.

In this matter, Parents did not contest the application of Montour to this matter, nor did they introduce any evidence that the limitation period should be extended for equitable reasons. I conclude that it is appropriate to apply the one year equitable limitation. Although Montour spoke in terms of a traditional “look forward” limitation – giving the parent one year from approval of a GIEP to file for due process and excluding the entire claim if the parent is late, Montour, 805 A.2d at 40 – Carlynton applied a one year “look back” period, Carlyton, 815 A.2d at 669. In the present matter, following

Carlynton, I established the beginning of the relevant period at one year prior to the Parent's filing in this case, December 7, 2009.

Because the Student's fourth grade GIEP was agreed upon on June 18, 2009, (FF 14), Carlynton precludes me from ordering any relief regarding it. Nevertheless, the June 2009 GIEP did form an integral part of the overall gifted program⁴ in effect on December 7, 2009, so I have made certain findings about the nature of its provisions, without drawing any conclusion as to its appropriateness. My conclusions are limited to the period beginning December 7, 2009 and ending on the first day of hearings, January 7, 2011 (called the "relevant period" in this decision).

DISTRICT OBLIGATIONS UNDER CHAPTER 16

Under Pennsylvania law, a student found to be eligible as a gifted student is entitled to a plan of gifted individualized instruction (in other words, a "GIEP") designed to meet his or her unique needs. Centennial School Dist. v. Dept. of Educ., 517 PA 540, 539 and 785, 539 A.2d 785, 791 (1987); 22 PA Code § 16.31; § 16.32. GIEP goals must contain "appropriate objective criteria, assessment procedures and timelines for determining, on at least an annual basis, whether the goals and learning outcomes are being achieved." 22 Pa. Code §§16.32(d) (5).

The GIEP must provide an educational placement that ensures the provision of appropriate specially designed instruction and ensures meaningful educational benefit from the rate, level and manner of instruction. 22 PA Code §§ 16.41(b)(2). Such a

⁴⁴ In the hearing, Parent expressed some doubt about the use of this term, because the regulation speaks of an education "plan." 22 Pa. Code §16.1 (defining Gifted Education Plan). In this decision I use the term to refer to the entire combination of plan, placement and services that was offered and provided to the Student during the relevant period. See, 22 Pa. Code §16.1 (defining Mentally Gifted with reference to "programs").

placement must provide opportunities to participate in acceleration or enrichment, or both, and such opportunities must go beyond the services that the student would receive as part of a general education. 22 Pa. Code §16.41(b)(3).

Gifted education must address the student's individual educational needs arising from giftedness, but the law limits the extent of the benefit that must be provided to the student. The required specially designed instruction must be “[r]easonably calculated to yield meaningful educational benefit and student progress.” 22 Pa. Code §§ 16.1 (“Gifted Education” at vii). This standard does not require the district to provide services that maximize the student’s benefit or progress, Centennial School Dist., 517 PA 551, 539 A.2d 791; rather the services need only provide the student with meaningful benefit or progress – that is, the benefit must be more than trivial.

Gifted education is limited to the education available within the curriculum in the school district. Pennsylvania law does not require districts to provide “exclusive individual programs outside or beyond the district's existing, regular and special education curricular offerings.” Centennial School Dist., 517 PA 551-2, 539 A.2d 791-2. An administrative hearing officer has no power to order a district to provide educational services that are “beyond [its] curricular offerings” Brownsville Area School District v. Student X, 729 A.2d 198, 200-201 (Pa. Cmwlth. Ct. 1999). In particular, a district may offer a generic “pull out” program as long as it addresses the student’s individualized need, although it must offer more than generic “enrichment” services to a gifted student who needs more in order to realize meaningful benefit. See Centennial School Dist., 517 PA 551, 539 A.2d 791.

APPROPRIATENESS OF THE DISTRICT'S PROGRAM FOR STUDENT FROM DECEMBER 7, 2009 TO JANUARY 7, 2011

I conclude that the gifted education program that the District provided to the Student during the latter half of the 2009-2010 school year and the first half of the 2010-2011 school year met the requirements of Chapter 16. The program was individualized. 22 Pa. Code § 16.31 to 32; Centennial Sch. Dist., above; see 22 Pa. Code § 16.1 (defining “gifted education” at (vi) as “individualized”). The program provided opportunities for acceleration, enrichment and compacting that went beyond what was offered in the general education curriculum, 22 Pa. Code § 16.41(b)(3). The Student made educational progress, including mastery of the general education curriculum and further development of Student’s higher level thinking and other skills identified in the June 2009 GIEP. See 22 Pa. Code § 16.1 (defining “mentally gifted” in terms of “development” of intellectual and creative ability).

A clear preponderance of the evidence in this matter proves that the program was individualized to meet the Student’s identified needs arising from giftedness. The GIEPs in 2009 and 2010 both recognized that the Student’s achievement was beyond grade level in the core skills of reading and writing, and that the Student could study at an advanced level and pace in mathematics and other major subjects of study. (FF 1 to 8, 20.) The GIEPs recognized that the Student needed to develop Student’s abilities in higher level thinking. (FF 8, 20.)

During the relevant period, the Student’s fourth and fifth grade teachers, both gifted and regular education, focused on providing the Student with opportunities to develop and demonstrate higher level thinking through compacting the curriculum in language arts and mathematics, and providing enrichment activities for the instructional

time thus made available, both teacher-generated and responsive to the 2009 GIEP. (FF 9 to 12, 15, 17, 21, 23 to 26, 28, 29, 32, 33, 35 to 37.) Enrichment activities and supplemental materials at advanced levels were designed specifically for the Student. (FF 13, 22, 26, 27, 28, 35, 36, 37.)

The gifted programming was provided to the Student through a daily gifted pull out program in the social studies period of the day. (FF 9, 21.) This categorical grouping is permitted under Chapter 16. 22 Pa. Code § 16.41 (b). Gifted programming, however, was provided throughout the day through differentiated teaching, above grade level supplemental materials, enrichment activities designed for the Student, and compacting, thus exceeding the general education curriculum. (FF 9 to 12, 15, 17, 21, 23 to 26, 28, 29, 32, 33, 35 to 37.)

The preponderance of the evidence proves that the Student made meaningful educational progress during the relevant period. All teachers testified that the Student was appropriately challenged. (FF 7, 15, 17, 18, 25, 26, 27, 28, 30, 32, 33, 34.) Gifted teachers conferred and found that the Student had made progress by further developing Student's abilities in higher level thinking, risk taking, leadership and team work. (FF 15, 19, 20, 25, 27, 28, 30.) These conclusions were based upon extensive and varied assessments throughout the relevant period. (FF 15, 16, 20, 25, 28, 30, 31, 32, 36, 37.)

The Parent⁵, mainly through examination of District personnel, presented evidence - and based on that evidence argued – that the District's program was not based upon a highly developed, standardized data gathering and assessment of the Student's level of achievement in the curriculum. (FF 8, 10, 13, 20, 22, 25, 30, 31.) The Parent

⁵ The Student's mother presented the case for the Parents. In this decision, I refer to the Student's mother as "Parent" in the singular.

suggested that I should require that the District utilize a model emulating that which it uses routinely for children who are exceptional by reason of identification as children with disabilities. In such cases, present levels are thoroughly based upon a combination of standardized and curriculum based achievement testing, in addition to classroom assessments, District assessments and state assessments. IEP goals in this model are premised on a baseline of achievement or behavior and progress is measured numerically and objectively. The evidence in this matter does not support the appropriateness of such a model for the Student's gifted educational program.

In this matter, the only evidence that the above model is an appropriate one for gifted programming is the opinion of the Parent. The Parent has some level of qualification to form an opinion on this subject, but Parent's qualifications do not rise to the level of direct training or experience in gifted educational programming. Parent has a [redacted], through which the Parent has developed a specialized expertise in psychological and educational assessment. (NT 55-16 to 57-16.) The Parent is not a certified school psychologist, and cannot recall ever assessing a gifted student. (NT 53-22 to 55-15.) The Parent has limited experience in educational assessment in the school setting, (NT 56-18 to 57-2, 58-10 to 59-13), although the Parent specializes in [redacted]. (NT 54-2 to 9). The Parent has done review of the literature on educational assessment and policy. (NT 58-2 to 9.) I find that the Parent's opinion of the appropriate model for educational programming has reduced evidentiary weight based upon Parent's limited professional background in gifted programming.

Even if I were to give more weight to Parent's opinion, Parent's opinion offered little specificity as to the methods that should be used for a data based gifted program.

While repeatedly arguing that the GIEP present levels should be more data based, and that programming and progress monitoring should be based on assessments other than classroom assessments and teachers' subjective judgments of the Student's performance, the Parent offered few specific alternative methodologies. Parent offered no evidence that higher level thinking skills can be reduced to measurements and objective baseline or progress data. Parent pointed to no specific assessment instruments that would do so. Parent did not indicate whether or not any such data should be relied upon solely or in conjunction with teachers' classroom assessments and subjective judgments. The only suggestion that Parent made was that the Student should be tested above grade level through unspecified achievement tests, and thus the appropriateness of acceleration or compacting of the general curriculum could be ascertained.

In contrast, District staff are well qualified to offer opinions on the appropriateness of their more subjective and classroom based methods of guiding and differentiating programming for the Student. All staff are certified special education teachers, with at least masters degrees, and all are highly qualified. All have years of experience in teaching, including teaching gifted students. All demonstrated knowledge of curriculum and classroom techniques for differentiation and teaching with enrichment materials. I accord greater weight to their opinions.

District staff indicated that the District's approach to gifted education relied upon classroom assessment and subjective teacher evaluation, along with some more objective data on reading, mathematics and writing skill levels. (FF 16, 20, 31.) The teachers opined that higher level thinking skills are not easily amenable to standardized testing, (NT 943-1 to 6), and that any such scores would not be sufficient for assessing the

Student's higher level skills without the benefit of teacher interaction with the Student on a day to day basis. The teachers thus suggested that it is not possible to design a gifted program that addresses higher level thinking skills based primarily upon data from standardized or other objective test instruments. (FF 16, 25, 32, 37.)

The teachers opined that the District's approach was superior to any such purely data-driven model, because it corrects for the limitations of standardized testing, and allows the teacher to customize enhancement opportunities to the Student's needs and interests seamlessly within the curriculum. They also pointed out that a data driven model would be inconsistent with the District's gifted education curriculum, especially in science, where the instruction is problem-oriented and emulates the scientific method of observation, hypothesis and testing, and mathematics, where the curriculum is a "spiral" and achievement testing would not reliably identify mastery of future curricular material. (FF 16, 25, 33, 37.) This record contains no substantial evidence to contradict the District teachers' testimony. Thus, the weight of the evidence preponderantly supports their opinions.

Even if there were contrary evidence of preponderant weight, Chapter 16 does not explicitly require the District to provide a program that is based upon either above grade achievement testing or other data-driven models. Nowhere does the language of Chapter 16 mention either requirement. The regulation does require utilization of "appropriate objective criteria, assessment procedures and timelines for determining, on at least an annual basis, whether the goals and learning outcomes [of the GIEP] are being achieved." 22 Pa. Code § 16.32(d)(5). I find and conclude that the program offered to the Student meets this requirement of Chapter 16.

The program relied upon objective measures of achievement and of performance. The Student's teachers utilized standardized measures of word reading, reading comprehension and mathematics achievement. (FF 15.) The program also utilized one instrument that measures higher level thinking skills. (FF 8, 10, 20.) Classroom assessments included quizzes and tests directly measuring mastery of the curriculum being taught. (FF 15.) Rubrics, both District – created and teacher-created were utilized to provide some objectivity in assessment of written work and projects completed. (FF 31.) These were administered on a less than annual basis and the Parent was advised of the Student's performance based on these measures. (FF 10, 15, 31.) District staff testified that these measures were appropriate. GIEP goals were based upon projects which in themselves provided objective data. (FF 10, 20.) The record discloses no substantial evidence to the contrary. Therefore the record is preponderant that the District complied with 22 Pa. Code § 16.32(d)(5).

Even if a data-driven program would be the state of the art and would maximize the Student's progress, Chapter 16 does not require a district program to provide such a service. Centennial School Dist., 539 A.2d at 791. Like the IDEA, Chapter 16 is not meant to require state of the art programming. Nor is the District required to deliver services to maximize the Student's potential. Centennial School Dist., 539 A.2d at 791. The District provides a legally appropriate program if he program is reasonably calculated to provide meaningful educational benefit. If it meets this modest standard, even a flawed program meets the legal standard. See, In re Educational Assignment of E.D., Spec. Educ. Op. 1564 at 7-8 (January 10, 2005). The evidence is preponderant that the District's program reached this level of legal appropriateness.

The Parent argued that the District's program must contain present levels of achievement, goals and SDI for every subject that the Student was taking, so that educators – and Parent - would know where in the curriculum to start every year. Again, Chapter 16 does not explicitly or implicitly require the program to address every subject in such detail. Its demands are more generally expressed, and the District met the law's demand by choice to design a more generic program that addressed higher level thinking skills directly. The evidence showed preponderantly that the District's curriculum for gifted students utilized a variety of techniques for assuring that the Student was appropriately challenged and working at Student's level of ability.

The evidence also showed preponderantly that, for a gifted student, it was not so simple as starting from a known point in the curriculum and moving forward in linear fashion. Curricula were not all linear, and the District's gifted curriculum emphasized interspersing enrichment activities to deepen and broaden the Student's exposure to ideas inherent at any point in the curriculum, and to challenge the Student to develop skills within the curriculum.

Parent argued that there were no GIEP goals to measure progress in science and mathematics. However, the evidence is preponderant that gifted programming was provided in these subjects, as well as the core subjects and humanities courses of study. SDI specifically directed gifted programming in science and mathematics. Such programming was delivered in each of these subjects, primarily through compaction opportunities and enrichment activities. SDI required teachers to minimize repetition in these subjects and the mathematics teacher did utilize pre-testing for this purpose.

Chapter 16 does not require that the GIEP provide a goal or services for every subject. Rather, the Chapter requires the district to take into account the student's educational needs to an appropriate extent, so that the program as a whole is reasonably calculated to provide meaningful educational benefit to the child. 22 PA Code §§16.22(e). Nowhere do the regulations require a GIEP to be broken down according to specific subject, course or curricular standard; a more generic analysis therefore will suffice to meet the plain language of the regulations.

The evidence showed that pre-testing was not possible in the science curriculum because it was a problem-based curriculum requiring students to use hypothesis and testing to emulate the scientific method. This is consistent with the requirements of Chapter 16. A district is not required to provide different curriculum or provide teaching that is not part of its curriculum. Brownsville Area School District v. Student X, 729 A.2d at 200-201.

Parent argued that the District's teachers disbelieved in the utility and necessity of achievement testing and the use of data in program planning and implementation. While the teachers did testify that some higher level thinking skills are not amenable to measurement, the Parent mischaracterizes their testimony. The record is preponderant that the teachers and the gifted program coordinators embraced the need for achievement testing and other forms of testing. They utilized a variety of instruments and forms of assessment, both in the present levels section of the October 2010 GIEP and in the day to day implementation of gifted education during the entire relevant period.

The District's position, uncontradicted by substantial evidence of record, is that standardized and other achievement testing is not sufficient to provide the kind of day to

day assessment data needed to provide gifted education to the Student in the context of the District curriculum. Thus, the Parent's argument distorts the extent to which the District did not rely upon data.

Parent testified that the Student was sometimes bored with the District's curriculum. While boredom is a matter for concern, the evidence of boredom in this record does not outweigh the evidence that the program was appropriate and that the Student made progress. The Parent's testimony was hearsay, and although there was some documentary corroboration, it was very limited and does not support the conclusion that boredom was a pervasive problem or a red flag that the program was not working for the Student. Moreover, teachers testified credibly to the contrary. (NT 589-1 to 590-25.) This evidence does not have sufficient weight, even in conjunction with the Parent's evidence of a lack of data-driven methodology, to show that the District's services were inappropriate under Chapter 16.

The Parent argued that the Student's inability to complete the journals that were offered as an enrichment activity showed a lack of direction in the educational program, which was due to a lack of sufficient data-based procedures. However, District personnel rebutted this argument by showing a preponderance of evidence that journaling was intended to be contingent upon mastery of the regular curriculum, which was advanced and fast paced. Thus, I find that the Student's inability to complete the journals was evidence of a lack of mastery, and therefore of appropriate pace and level of challenge.

In weighing the evidence, I give little weight to the Parent's only other witness, Parent's advocate. The advocate was qualified to testify to any knowledge or information acquired through professional performance of the role of advocate. The advocate was not

qualified as an expert in education and was not able to provide substantial evidence bearing on the appropriateness of the District's 2010 GIEP or educational services provided during the relevant period.

CONCLUSION

For the reasons set forth above, I conclude that the District's services during the relevant period were consistent with the requirements of Chapter 16. Consequently, there is no need to order relief. Any claims not specifically addressed by this decision and order are denied and dismissed.

ORDER

1. The District did not fail to provide an appropriate gifted education program to the Student during the relevant period from December 7, 2009 to January 7, 2011.
2. The hearing officer will not order the District to provide compensatory education.
3. The hearing officer will not order any other equitable relief with regard to the Student's gifted education program.

William F. Culleton, Jr. Esq.
WILLIAM F. CULLETON, JR., ESQ.
HEARING OFFICER

April 2, 2011