

#2635

RECEIVED

**From:** Schalles, Scott R.  
**Sent:** Monday, September 15, 2008 8:23 AM  
**To:** Gelnett, Wanda B.  
**Cc:** Wilmarth, Fiona E.  
**Subject:** FW: Gifted Education Concerns and Questions --- Please read before voting on new Chapter 16 regulations  
**Importance:** High

2008 SEP 15 AM 8:39

INDEPENDENT REGULATORY  
REVIEW COMMISSION

comment on 2635

-----Original Message-----

**From:** Buckheit, James [mailto:jbuckheit@state.pa.us]  
**Sent:** Friday, September 12, 2008 3:23 PM  
**To:** Schalles, Scott R.  
**Subject:** FW: Gifted Education Concerns and Questions --- Please read before voting on new Chapter 16 regulations  
**Importance:** High

Scott – I am forwarding this message as it appears that IRRC is the only entity involved in the review of Chapter 16 that was not included in its distribution.

Jim Buckheit | Executive Director  
 State Board of Education | PA Dept of Education  
 333 Market Street | Harrisburg, PA 17126 0333  
 Phone: (717) 787-3787 | Fax (717) 787-7306  
 jbuckheit@state.pa.us | www.pde.state.pa.us

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-----Original Message-----

**From:** Adelle and Jim [mailto:jdandab@jdandab.cnc.net]  
**Sent:** Friday, September 12, 2008 2:50 PM  
**To:** Buckheit, James; Robert Godshall; Raphael Musto; James Rhoads; James Roebuck; Jess Stairs; John Tommasini; Joseph M. Torsella; Robert Wonderling; Gerald Zahorchak  
**Cc:** Brown, Richard; Dolbin, Donald; Moss, Richard; Shoop, Jane; Thrush, Barbara A; Wells, Ronald; Zeigler, Nancy  
**Subject:** Gifted Education Concerns and Questions --- Please read before voting on new Chapter 16 regulations  
**Importance:** High

September 2008

To whom it may concern:

We are the parents of a gifted student in the North Penn School District (NPSD) in Lansdale and we have been involved for several years now in attempting to get NPSD to provide an appropriate education for our son. Our

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family has played by the rules and has yet to see NPSD abide by the laws and regulations of the Commonwealth, and in at least one instance, the Federal government. This in spite of the fact that NPSD has been ordered to do so by now three judicial panels. These legal panel decisions, in all of which our family has prevailed, are attached for your convenience. We feel that our story illustrates a significant deficiency in the way the Commonwealth's educational laws and timelines are structured and enforced, or rather not enforced. We would appreciate our elected and appointed government and education officials' comments on what we feel is an example of an abuse of the public trust and advice on how that can be corrected now and prevented in the future.

Moreover, we feel prompted by a sense of civic duty, in light of the impending vote on the new Chapter 16 regulations scheduled for an IRRC vote on September 18, to inform those who are in a position to act, to take the necessary steps to eliminate the existing "loopholes" that our legal cases and our experiences so obviously expose. We feel these concerns should be addressed prior to passing the new Chapter 16 regulations and hope the SBoE will recall the document to do this. We feel overwhelmed and do not know quite how to proceed, but hope that by making our story known to you stakeholders, steps can be taken to prevent this from happening to anyone else.

Also, it has just come to our attention that the Pennsylvania Association for Gifted Education (PAGE) Board of Directors has sent the IRRC a letter stating their support for the final form regulations of Chapter 16. As a PAGE member, no one from the PAGE ever polled or contacted me regarding this issue. I do not agree with the PAGE Board, and along with many other PAGE members, have signed on as signatories to a letter stating that we feel revisions are needed prior to passing this legislation and detailing our concerns. This letter was sent in to the public comment section of the IRRC by Todd McIntyre, and we would like to direct you to it.

We will now elaborate on some additional concerns that we feel also need to be taken into consideration, based on our rather unique set of experiences. This includes having NPSD, take our family to Commonwealth Court in their unsuccessful attempt to try to overturn the strongly worded #1791.

To briefly summarize, our family has prevailed in a series of legal cases, with three different sets of judicial panels agreeing strongly with us and not at all with NPSD.

To quote the Special Education Appeal Panel in the attached #1791:

"This panel is appalled by the District's lack of compliance with the requirements of Commonwealth regulations and due process orders. In the future we urge the District to be conscientious about discharging its legal responsibilities. Parents have every right to expect that the District to be fully compliant with the Commonwealth's regulations and that hearing officers and Appeals panels will demand compliance with them."

The Commonwealth Court in the attached #278CD07 strongly affirmed #1791, rejecting each and every one of NPSD's arguments to overturn, even labeling one as "specious."

To reiterate, even though our family has prevailed in the courts, the only avenue that we understood was available to us, over the last couple of years, we have never received an up-to-date and compliant GIEP from NPSD which is they were ordered to produce by the very first person to officially hear our case, hearing officer #1, back in May of 2006. Highlights from her decision, which NPSD appealed and lost, are included in that Special Education Appeal Panel #1737 decision attached.

Filling in the legal "loopholes" that enabled this to happen, in an enforceable manner with actual consequences should serve as a deterrent for school districts before they decide to fight families via time consuming and

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costly litigation. This entire procedure should be taken very seriously and made clear to parents exactly how to pursue it. In our son's case, NPSD has "played" the system in an attempt to exhaust our family mentally and financially while simply delaying the District's inevitable legal obligations to our son. More importantly, these delaying tactics have had negative impacts on our son's academic and emotional growth by putting essential services on hold pending litigation and even afterwards. Ironically, the cost for services for a gifted student are generally extremely low due to their more independent study based tilt and likely orders of magnitude less than the District's overall legal costs were to fight to deny them.

Also, our experiences have shown that the proposed elimination of the Appeals Panel for gifted due process cases could be a significant blow to the Commonwealth's gifted children. Both sets of Appeals Panels have found NPSD to have been in flagrant violation of education law, the first one that affirmed, with slight modification, hearing officer #1's decision so as to more closely align with the intent of Chapter 16 (#1737), and the second that overturned entirely a hearing officer's "superficial and incorrect" analysis and conclusions (#1791). In this second appeal (#1791), we were able to argue that ourselves, pro se, and successfully receive the total reversal of what was a hearing officer's erroneous decision.

Relatedly, we feel the inability of the prevailing families in Chapter 16 cases to recoup their legal fees from their school district, compared to the prevailing families in Chapter 14 and related cases, places an undue financial burden on the families of those children who learn "differently" due to their giftedness. Especially with the elimination of the Appeal Panel and no legal alternate than to appeal to higher level courts where an attorney would likely be essential, if not required. Why should parents have to spend countless hours, thousands of dollars, and constantly explain or re-explain repeatedly their strongly legally supported position to so many individuals and government organizations while their child's valuable educational years are stalled just to try to get their school district to comply with the laws, regulations, and orders of the Commonwealth and the Federal government that they are required to follow anyway?

The details in the remainder of this letter are in response to the reply we received last month from the PDE's Bureau of Special Education to our original query of the Secretary of Education. A copy of this exchange appears at the end of this letter. While very detailed, we feel the issues presented highlight the very deficiencies, specifically the absence of any enforcement whatsoever, in the system as it currently stands and remain unaddressed in the proposed new regulations as currently written.

To start, we are not satisfied that the BSE conducted a thorough investigation in their "attempt to acquire factual information regarding your concerns relevant to not having a GIEP in place for the 2008-2009 school year." They appear to have accepted NPSD's response without further follow up. Given NPSD's legal history in our cases alone, we find this very troubling and intend to begin to set the record straight by explaining our side of the story and providing additional examples of where NPSD has been less than forthcoming or complete in their dealings with the Commonwealth.

Specifically, it should be know that the GIEP apparently presented to the BSE by NPSD dated November 14, 2007, was "constructed" and labeled as a draft GIEP during an ODR mediation session on that date. The implication by NPSD that this document, which we never approved of, meets the criteria explained in "unambiguous and painful detail "(#1791) in the above legal rulings and simply needs to be "revised" as our son enters a new building for the 2008-09 school year is highly misleading, if not downright disingenuous.

In fact, our son's course of studies during the 2007-2008 school year began to change immediately after the mediation session, thus causing this GIEP that you have been presented, which had always been incomplete from its inception, to list educational programs that were now no longer being offered to him. Moreover, part of that document's content that did remain relevant to our son's then current classroom status was never implemented. Heeding the advice of the Appeal Panel in #1791 to "work together", we worked cooperatively

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with the middle school principal to improve our son's day to day educational program, trying to maneuver around the many issues of administrative inconvenience and other obstacles that the District's central office unreasonably imposed. NPSD neither tried to revise this November 14 GIEP or take us to due process for failure to approve, as we understand from both Chapter 16 and from the language in our decisions that they should have. And now they are trying to masquerade this document to the PDE as a compliant and in-force GIEP that met all the student's needs as ordered and affirmed, and was agreed upon by the GIEP team, which it never was.

As far as developing a GIEP for the 2008-09 high school year, again following the guidelines specifically stated in our attached rulings, we began trying to inquire about high school planning, including Advanced Placement issues, in January 2008, when all incoming NPHS students began the process. Unfortunately, since we received only limited information at best, we finally took to formally requesting a GIEP meeting in April 2008, by which time the other incoming new high school students had already received initial verification of their course requests. Since our questions pertaining to high school courses remained unanswered, we had no previous experience with the high school as our son is our oldest child, and there were no meaningful, updated PLEPs in the GIEP, our family's ability to determine which courses would be appropriate remained stalled and no developmental work was done on his 2008-09 GIEP either.

On May 14, 2008, we were granted a meeting with some North Penn High School personnel, but no classroom teachers, at which they agreed with us that more information was needed and promised to supply documents and set up contact time with potential classroom teachers or subject department heads within the week, so that informed choices could be made. We supplied at that meeting, the one document that was requested of us.

After the week passed with no movement on their action items, we contacted the high school principal (no high school GIEP team had even been named) who now replied to us and copied to the meeting attendees that "the high school's primary focus at this time of year is ensuring that our 1160 seniors graduate" and that he "will get the answers as soon as time permits", effectively taking anyone else out of the picture to assist us.

Having still had no contact from high school officials, on July 8, well after graduation and after the district-imposed deadline for all parental course change requests, we took up our concerns to the NPSD Board of Directors. This only led to a letter from the high school simply reiterating, yet again, its original unsupported claims from the May 14 meeting that we had contested and still refusing to provide us details promised; there was no follow-up from the school board. Furthermore, the high school now claimed that the teachers, although obviously done preparing students for graduation, would not be made available to discuss essential topics such as "enrichment, coursework, and service delivery" as the BSE suggests in its note, until after school started.

On August 14th, interestingly not until after we had contacted the PDE, the NPHS administration finally scheduled a second meeting whose agenda was to "begin to prepare the GIEP, finalize the program for [our son] for 2008-2009, and explore options for future years at North Penn" While more forward thinking than previous meetings, some of our original questions remained unanswered, not all the classes or means for providing education / services could be agreed upon, and further testing was determined to be needed. And, as in May, since there were no teachers present at this second meeting either, appropriate classroom goals or accommodations could not even be discussed, let alone be developed.

In summary, the denial of access to teachers or their input alone, not to mention the myriad of additional procedural irregularities, render both the May 14 and August 14 administrative meetings unable to be characterized as GIEP meetings, despite our request for one back in April. Could someone please answer what is the legal timeline for reconvening the GIEP team? By the way, during all of this, no one from NPSD informed us that the District felt the November 14 GIEP, that we constantly questioned and did not approve of, was valid, yet they certainly presented it to BSE as such.

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While the BSE's contact with NPSD has apparently restarted the stalled communications with the high school for which we are grateful, we would still like an answer to the original question: is there any way to force NPSD to comply with Special Education Appeal Panel decisions, Commonwealth Court decisions, or perhaps Chapter 16?

Moreover, we would now like the PDE or SBoE to answer some additional questions related to other instances of the NPSD's lack of compliance or good faith dealings regarding our son's education.

Another example of this is the "assurance form" dated June 2, 2006 which states that NPSD had "fully implemented" the May 2006 hearing officer decision that had made clear in "unambiguous and painful detail" what the District was required to do. Since our subsequent legal rulings found otherwise, clearly NPSD did not provide the Commonwealth with "factual" information here either. If that is not enough, NPSD sent this form to ODR nearly a month before they first held a GIEP meeting with us and over two months before we received the first post-ruling GIEP and NORA.

After we questioned ODR to inquire why NPSD was not implementing the hearing officer's order, they told us that they were in receipt of the above mentioned assurance form. Since that form had gone unmentioned on by the parents, they assumed everything was fine. This communication with ODR was the first we had ever heard that such a document or procedure even existed. ODR then sent us a copy of this assurance form which we subsequently contested in that we filed for due process on issues within it.

After our second set of hearing / appeal panel decisions had concluded, we contacted ODR to inquire about the assurance form for this second set of rulings. We were informed that since NPSD had appealed the case up to the Commonwealth Court, it was now out of ODR's jurisdiction. They assumed that the District would still be required to provide an assurance form after the Commonwealth decision came in as well, should the Commonwealth Court find against them, as it did. Since that opinion was handed down in September 2007, a year ago now, we have not seen a copy of the second assurance form and do not know how to get one. ODR says they don't have it. Could you please let us know who to contact to procure it and what the procedure is to follow through and contest it?

Another example of NPSD's failure to comply in good faith with educational law is that NPSD predicated their entire second case legal arguments of proposed programming for our son solely on his performance on a handful of standardized tests they gave him in May of 2006. Amazingly, they have yet to provide us any independent evidence of these test results, such as copies of the raw data, score sheets, or evaluation breakdowns which, as we now know, should always accompany this type of testing.

NPSD provided us a summary of our son's supposed results unofficially within the text of the GIEP. They then proceeded to use these incomplete and unverified "data" as "evidence" for their viewpoint in the second set of legal proceedings. The NPSD arguments based on this data, along with the entire GIEP, were rejected all the way up to the Commonwealth Court, although NPSD was successful at having our family, along with their taxpaying base, accrue legal fees while simultaneously causing extensive delays in their obligations to meet our son's needs.

After initially refusing to even acknowledge our many requests for the breakdown of these testing results, NPSD eventually claimed, over a year after the fact, that they had destroyed them immediately after the original testing as is "routine District practice". This is in disagreement with what many other parents informed us who did receive copies of their child's test results from the District and, of what we understand, the FERPA law.

We now appear to have found a supportive administrator and some other apparently well intentioned individuals at the high school, as we did at the middle school, but unfortunately never at the elementary school. We sincerely hope that these individuals will be able to do right by our son and work together with us in good

9/15/2008

faith to enable the creation of a fully compliant GIEP that details a meaningful educational plan which meets our son's needs, without the interference of those higher ups who are not so inclined.

We find it very troubling that the North Penn School District chose to fight to deny a child who loves to learn the opportunity to do so appropriately and even more so that they are able to get away with it for so long. Given the great cost, literally and figuratively, of what turned out to be disputes that were blatantly indefensible by NPSD, we feel it is only right to have those NPSD administrators responsible be held accountable. We hope that by making our story known to government officials, we can be advised as to what we can do to help that process along and finally fix our situation as well as help prevent this from happening to anyone else, both within our district and across the state.

Tens of thousands of children in Pennsylvania are depending on it.

Thank you for your attention and help in this matter.

Jim DeFelippis and Adelle Bergman

(215) 412-5522

North Penn School District parents and prevailing party in attached legal decisions

----- Original Message -----

From: "Wells, Ronald" <ronwells@state.pa.us>

To: <jdandab@concentric.net>

Cc: "Zeigler, Nancy" <nzeigler@state.pa.us>; "Dolbin, Donald"

<ddolbin@state.pa.us>; "Moss, Richard" <rimoss@state.pa.us>

Sent: Wednesday, August 06, 2008 10:03 AM

Subject: Respns to Jim DeFelippis letter1.doc

Dear Dr. Jim DeFelippis,

On behalf of Mr. John Tommasini, Director of The Bureau of Special Education, I am responding to your e-mail of July 30, 2008. The Bureau of Special Education contacted North Penn School District officials in an attempt to acquire factual information regarding your concerns relevant to not having a GIEP in place for the 2008-2009 school year. The district provided a copy of a GIEP constructed on November 14, 2007 which would be in effect through November 14, 2008. However, due to the nature of the transition from the middle school to the high school, it is suggested the GIEP be revised reflecting the GIEP team's decisions of enrichment, coursework, service delivery, and scheduling to appropriately meet the academic needs and interests of your son

I spoke to Mr. John Iannacone who assures me that district personnel will contact you to schedule a review GIEP meeting. Please continue to maintain communication with school personnel and move forward with a revised GIEP.

Sincerely, Ron Wells, BSE

9/15/2008

-----Original Message-----

Jim DeFelippis/NAR/Rohm Haas

07/30/2008 05:33 PM

Not Registered

To [secretary@psupen.psu.edu](mailto:secretary@psupen.psu.edu)

cc

Subject Gifted Education Question

Dear Sir,

I am the parent of a gifted student here in PA, and I have a question about enforcement of education law.

Our gifted child has had to take North Penn School District (NPSD) to due process twice in the past three years, both cases were ultimately decided in my son's favor. The second case was appealed to the Commonwealth Appeals Court by NPSD, and again the case was decided in my son's favor. The decisions basically told NPSD that they should comply with the law, and develop a fully compliant GIEP with our son. Unfortunately NPSD has not complied with his Commonwealth directive, no GIEP is in place, no education plan for the coming year (my son is entering 10th grade) has been developed, and our repeated requests for GIEP meetings have been ignored.

My question to you is: Is there any way to force NPSD to comply with Commonwealth court decisions, or perhaps Chapter 16?

My wife and I have been trying to meet our son's educational needs, but shouldn't our school make some effort to comply with the law? Or shouldn't the Commonwealth make some effort to enforce the law, and court decisions?

Please let me know where we should go for some support. Feel free to reply to this message, e-mail me at home ([jdandab@concentric.net](mailto:jdandab@concentric.net)), or call me at 215-412-5522 (home) or 215-619-1405 (work).

Thank you for your prompt reply,

9/15/2008

Jim DeFelippis



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

**SPECIAL EDUCATION DUE PROCESS APPEALS REVIEW PANEL  
COMMONWEALTH OF PENNSYLVANIA**

IN RE THE EDUCATIONAL ASSIGNMENT : SPECIAL EDUCATION  
OF D.D., A STUDENT IN THE : OPINION NO. 1737  
NORTH PENN SCHOOL DISTRICT :

BEFORE APPEALS PANEL OFFICERS HEETER, LYTTLE AND MCAFEE  
OPINION BY LYTTLE, APPELLATE OFFICER

**BACKGROUND**

The xx-year old, fifth grade Student, who is the subject of this appeal, resides in the District. It is undisputed that the District evaluated the Student in first grade and correctly identified Student as eligible for the gifted program pursuant to 22 PA Code § 16.5-1. At issue in this case is the disagreement between the parties concerning gifted programming and placement.

Student has had a gifted individualized educational program (GIEP) since first grade which was based upon a multidisciplinary evaluation; and has been formally assessed only by two nationally normed tests; the PA System of School Assessment (PSSA) in reading and mathematics (3<sup>rd</sup> grade), and the Terra Nova in February 2005, (4<sup>th</sup> grade), since that time. FF10-12; 39-43; 61, 69. The Parents attended the November 23, 2004 (4<sup>th</sup> grade) GIEP meeting and signed the Notice of Recommended Assignment (NORA). FF13, 14. This 2004 GIEP, as slightly modified on November 18, 2005 and on January 25, 2006 (5<sup>th</sup> grade); was rejected by the Parents. FF15-19, 25, 26, 52, 53, 54, 56, 61, 68, 69, 70, 77, 84. Rather, the Parents requested the Student be accelerated to the next grade

level. District responded by seeking Parents' agreement to a re-evaluation; citing that the only multi-disciplinary evaluation was obsolete (over four years old); and new evaluative data was due and necessary. See especially NT 103-108; see also FF10, 20, 28, 29, 30, 31, 32, 33, 39, 40, 41, 43, 61, 69, 87, 89. Parents did not sign the requested permission to evaluate form; and the District failed to request a timely due process hearing (DPH) to pursue the evaluation. *Id.*; FF91. Finally, Parents, on February 13, 2006, requested this DPH alleging denial of a free appropriate public gifted education (FAPE); requesting the remedies of compensatory education for Student's fourth and fifth grade years (2004-2005 and 2005-2006, respectively) and immediate grade acceleration. The District posed that it provided FAPE during the relevant years; and that a re-evaluation is necessary to determine appropriate present levels of performance, programming, or placement, which has been impossible to accomplish due to Parents' refusal to acquiesce to the re-evaluations.

The two session open hearing was held on April 4 and 11, 2006. In a twenty-four page decision, filed May 4, 2006, the Hearing Officer ordered the following:

#### ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby ORDERED that:

1. The School District shall complete a gifted multi-disciplinary evaluation of Student, including an evaluation report, within fifteen (15) school days of the date of this Order or at least ten (10) days before the last day of the 2005-2006 school year, whichever is sooner. The evaluation report will be shared with the Parents within two (2) school days of its completion.

2. Not later than the last day of the 2005-2006 school year, the School District shall convene a Gifted Multidisciplinary Team (GMDT) to consider and determine whether or not Student should be accelerated during the 2006-2007 School Year. If the determination is to recommend acceleration, the School District shall take all steps necessary to implement this decision at the start of the 2006-2007 School Year.

3. The School District is directed to prepare a GIEP for Student which complies in all respects with the requirements of Chapter 16 not later than the tenth school day of the 2006-2007 School Year.

4. In the event that the GIEP for the 2006-2007 school year requires continued association between Student and [name of peer redacted], the School District is directed to investigate any complaints by Student or Student's Parents in a timely fashion. A School District official independent of those who were involved in the prior investigative process should be utilized to make this determination.

5. The School District shall provide compensatory education services equaling three (3) hours per day for those days Student actually attended school since February 13, 2005 and for every day of attendance until a GIEP complying with Chapter 16 is in place. The School District shall provide Parents with a written accounting of the calculation of the hours of compensatory education due. Parents may make the initial selection of the form of the compensatory education so long as it represents any appropriate enriching instruction that furthers the goals of Student's 2006-2007 GIEP or future GIEP's and is within the curriculum of the School District. Should the GIEP Team be unable to agree with the Parents' selection, the parties are directed to engage in good faith efforts to resolve their differences or to utilize the mediation procedures set forth in 22 Pa. Code §16.64. Any compensatory education services in compliance with this Order must be in addition to Student's then current GIEP and may not be used to supplant recommended GIEP services.

H.O. Dec. @ 23 & 24.

## ISSUES PRESENTED

The District timely filed a fourteen-page document (Exceptions) specifically excepting to:

1. the Hearing Officer's placement of the burden of proof;
2. the award of, or in the alternative, the amount of, compensatory education.

The Parents filed a twelve-page document in response (Response) urging the Panel to, "strike a blow for gifted education and affirm the Hearing Officer's decision below." Parents' Exc. @ 11.

## DISCUSSION

### Scope of Review

Our analysis begins with the Appeals Panels' scope of review, as enunciated in *Carlisle Area School District v. Scott P.*, 62 F.2d 520 (3rd Cir. 1995), where the Third Circuit stated:

"We thus hold that appeals panels reviewing the fact findings of hearing officers ... should defer to the hearing officer's findings based upon credibility judgments unless the non-testimonial, extrinsic evidence in the record would justify a contrary conclusion or unless the record read in its entirety would compel a contrary conclusion." 62 F.3d at 529.

In *In Re: The Educational Placement of R. S.*, Sp. Ed. Op. #950 (1999), we analyzed this controlling precedent and held that:

"Of critical import is the Hearing Officer's use of pervasive, predominant, or overall, denoting general record support for his conclusions without denying the existence of such facts inapposite as parents cite. In those modifiers obvious credibility determinations exist which, since a whole record review or non-testimonial extrinsic evidence in it does not compel contrary conclusions, we can not reverse. Similarly, the remaining parental Exceptions must also fail

as they too would have us overturn credibility based determinations in the absence of a finding of record support for doing so.” Emphasis by underline added; see *also id.*

Every Hearing Officer is empowered to make determinations, *inter alia*, as to evidentiary weight and credibility, and the record need not be devoid of contrary evidence. Thus, this is the import of *Carlisle’s* holding, that Appeals Panels can reverse only when the whole record or non-testimonial extrinsic evidence compels a contrary conclusion.

In the present matter, measured against this standard, this Hearing Officer’s Decision and Order are affirmed with modification.

The Hearing Officer’s Orders number one (1), concerning rapid completion of “a gifted multidisciplinary evaluation of Student;” and four (4), concerning Student-peer interactions, were not excepted to, and therefore, stand as written.

The Hearing Officer’s Orders number two (2) and three (3) shall be modified; and number five (5) affirmed, in accordance with this Decision<sup>1</sup>.

### **The Student is Entitled to Compensatory Education**

The threshold question in the present matter, as appealed, is whether Student is entitled to compensatory education for the period from February 13, 2005 until an appropriate evaluation, GIEP, and placement are implemented. In a 2003 Basic Education Circular (BEC), the Pennsylvania Department of Education (PDE) clarified the “responsibilities placed upon school districts with regard to the provision of gifted education.” See PDE BEC: **Special Education**

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<sup>1</sup> The Hearing Officer’s Orders and Issues complement, but do not perfectly correlate. We find that any Hearing Officer findings or conclusions not modified by this Decision, stand as written.

**for Gifted Students** re: 22 PA Code § 16; March 26, 2003-June 30, 2007. The relevant parts of this BEC follow:

**(1) Identify and Evaluate Gifted Students**

School districts are required to identify all students of school age (grades K-12) within their boundaries who are thought to be gifted...If teachers or parents suspect that a student is gifted, the district must refer that student for a Gifted Multidisciplinary Evaluation (GMDE)....

The GMDE, which is to be completed by the Gifted Multidisciplinary Team (GMDT), must be sufficient in scope and depth. GMDE procedures should include opportunities to acquire sufficient information to make a determination as to whether a student is gifted and in need of specially designed education. The GMDE may include, but is not limited to, ability tests, nationally normed and validated achievement assessments, individualized achievement assessments, class work samples, curriculum based assessments, cumulative review tests, performance based skills as demonstrated in portfolios, products, projects, competitions, or other demonstration of skills, teacher observations, noteworthy achievements and parental input..No one test or measure is sufficient to determine giftedness, and the evaluation and testing literature recognizes that there is a margin for error in any standardized testing.

Following its evaluation, the GMDT prepares a Gifted Written Report (GWR), including recommendations as to whether a student is gifted and in need of specially designed instruction. The GWR becomes the basis for the Gifted Individual Education Program (GIEP) team's determination as to whether the student is gifted and in need of specially designed instruction....

**(2) Develop a Gifted Individualized Education Program (GIEP) for each Gifted Student**

Districts must appoint a GIEP team to review the GMDT recommendations. If the GIEP team determines that a student is gifted, it must develop a GIEP for that student.

*Specially designed instruction for gifted students may result in the adaptation or modification of the general curriculum, including compacting learning experiences, accelerating the student, or placing the student in more than one grade level. Specially designed instruction may also have*

an impact on instructional environments, methods, and materials. Districts should be aware that the use of extra work, peer tutoring, or helping the teacher does not constitute specially designed instruction or gifted education, and Advanced Placement or Honors courses are not in and of themselves gifted education if they do not respond to the gifted student's individual needs.

*Gifted education must be **individualized** programming that addresses the gifted learner's need for acceleration, enrichment, or both to accommodate the student's individual academic abilities. Gifted programming must be "reasonably calculated to yield meaningful educational benefit and student progress". (22 Pa. Code §16.1(vii)). Strands of the Chapter 4: Academic Standards and Assessments may need to be reorganized across grade levels to allow the gifted student to show mastery at an earlier stage of development and to provide meaningful educational benefit of at least one year's growth for a year spent in school. Chapter 4 also requires acceleration, enrichment, or both for gifted students. (22 Pa. Code § 4.28(b).) This individualized program should be presented as a continuum of learning options for the gifted learner.*

### **(3) Determine Educational Placement Based upon each Gifted Student's Individual Needs**

*Students who are exceptionally gifted may need educational placement that is beyond age or grade level in order to align them with their ability and achievement. Districts are free to group across grades, according to academic talent, or based upon other performance characteristics. Depending on a student's talents or achievements, options for gaining credit for learning obtained outside the school district or advanced placement within the school district may need to be considered. Additionally, credit by examination may be an option to determine appropriate educational assignment. Graduation planning may need to be part of the GIEP process even for young gifted students, because acceleration sets the stage for earning credits early or out of sequence, for early graduation and/or for early admission to college.*

*Id.*; emphasis by italics.

Students are entitled to compensatory education when a school district has failed to provide FAPE. See generally 22 PA Code § 16; see specifically 22 PA Code § 16.41.

In the present case, the Hearing Officer's findings are clear and correct concerning the procedural and substantive inappropriateness of the 2004-2005 and 2005-2006 programming offered to Student. She writes:

Annual goals were described in this GIEP as follows:

1. To help the student monitor his educational progress effectively; 2. To help the student to develop and refine communication skills; 3. To develop and refine research skills; 4. To develop and refine higher level thinking skills; 5. To develop and refine creativity. Very general short term learning outcomes were provided under each annual goal. The Hearing Officer believes that these goals are neither individualized nor capable of being achieved. When a goal is written: "To help the student," this sounds more like an appropriate goal for a teacher. One might be able to assess whether or not the teacher helped the student but it says very little about where the student is headed and how achievement will be determined. Chapter 16 states that each GIEP must contain "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(e)(5). When specifically asked by the Hearing Officer whether Student had met any of his IEP goals contained in S-2, Student's principal conceded that one could not tell. (N.T. 403-404). These goals do not begin to meet the Chapter 16 requirements.

According to the GIEP, assessments were to be done through teacher observation and reviews. Again, these statements are so vague and subjective that they appear worthless. The Student's needs were described very generally as: challenges in all academic areas, opportunities to practice multi-step math problems, and science opportunities. Every child in public school would need "challenges in all academic areas." This statement says nothing about what this particular student needs.

The specially designed instruction included regular seminar and Adapt Time, in-class enrichment, independent



projects, group discussion, and computer activities among other things. While these may be a good general outline, they hardly seem descriptive of anything individualized or "special." Applying the criteria in Chapter 16 and Department of Education's "Gifted Guidelines dated 2004 (P-21, pg. 33), the only GIEP in place for this Student is simply inadequate. The proposed revisions are not improvements. Present levels of educational performance should be updated annually but they were not. The goals and outcomes should be child-specific and measurable but they are not.

For all of these reasons, in violation of 22 Pa. Code §16.41(b), the School District has failed to provide "appropriate specially designed instruction based on the student's need and ability" and has failed to ensure that Student benefits "meaningfully from the rate, level and manner of instruction." Student was denied appropriate specially designed instruction to enable him to benefit meaningfully during the second half of the fourth grade year and the entire fifth grade year.

HO Dec. @ 15 & 16.

The District additionally argues, erroneously, that the Parents praised teacher efforts and Student's positive state of mind, and thus established Parental approval of the GIEP and placement. See *e.g.*, SD Exc. @ 3, 13; S4. We heartily disagree. There is no authority cited by the District, nor does any exist, supporting their position that a parent's positive comments about a child or the child's teacher reforms or ratifies an inappropriate program and placement.

While we agree with the Hearing Officer's analysis and conclusion concerning the inappropriateness of the GIEPs, we also find them procedurally and substantively inappropriate because they are not based upon, nor responsive to, a current GMDE and GWR. See *specifically*, 22 PA Code § 16.41 (b)(1)(2); see *also* SD Exc. @ 5. The GIEPs failed to include current levels of achievement, and, as such, appropriate goals could not be designed nor

could progress be measured. In fact, the last multidisciplinary evaluation, it is agreed by the parties, was conducted over four years ago. Moreover, the GIEPs provided no measurable goals or objectives against which to gauge progress or determine present levels of achievement. Consequently, inappropriate GIEPs resulted and remain. The District's Exceptions are dismissed.

### **The Burden of Persuasion**

The District administrators, special education personnel, and teacher testified that there was no way to measure progress toward the GIEPs' goals, and further, that a thorough evaluation was due, and necessary, for appropriate programming and placement decision making. The District requested this permission from the Parents, which was never received. The District failed to request a due process hearing. On February 13, 2006, the Parents requested the hearing on other grounds. *Id.* The District argues that it "appeared" during the hearing that the Hearing Officer presumed the GIEPs to be inappropriate; when in fact, the District continues, since the Parents requested the hearing, they bore the burden of persuasion to "prove" the GIEPs inappropriate<sup>2</sup>. See *id.* @ 6 & 7 citing *Schaffer v. Weast*, 126 S. Ct. 528 (2005). Furthermore, *Schaffer* is a federal case based on interpretation of federal law. In Pennsylvania, gifted education is authorized strictly through state statutes and regulations. Although Commonwealth courts have applied some of the legal procedures of IDEA to gifted education, we are unaware of any court applying this federal burden of

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<sup>2</sup> We observe that the transcript and Hearing Officer Decision are void of any finding concerning formal placement of the burden of persuasion; and the Parents did not respond to this District Exception.

proof reasoning to a strictly state issue. However, assuming the District's argument to be true, we find that the Parents wholly and clearly met any such burden. The District's Exception is dismissed.

Accordingly, we enter the following:

### **ORDER**

The Decision and Order of the Hearing Officer are affirmed in part and modified in part.

A. Hearing Officers Orders number 1, number 4, and number 5 stand as written and reproduced here below:

1. The School District shall complete a gifted multi-disciplinary evaluation of Student, including an evaluation report, within fifteen (15) school days of the date of this Order or at least ten (10) days before the last day of the 2005-2006 school year, whichever is sooner. The evaluation report will be shared with the Parents within two (2) school days of its completion.
4. In the event that the GIEP for the 2006-2007 school year requires continued association between Student and [specified classmate], the School District is directed to investigate any complaints by Student or Student's Parents in a timely fashion. A School District official independent of those who were involved in the prior investigative process should be utilized to make this determination.
5. The School District shall provide compensatory education services equaling three (3) hours per day for those days Student actually attended school since February 13, 2005 and for every day of attendance until a GIEP complying with Chapter 16 is in place. The School District shall provide Parents with a written accounting of the calculation of the hours of compensatory education due. Parents may make the initial selection of the form of the compensatory education so long as it represents any appropriate enriching instruction that furthers the goals of Student's 2006-2007 GIEP or future GIEP's and is within the curriculum of the School District. Should the GIEP Team be unable to agree with the Parents' selection, the parties are directed to engage in good faith efforts to resolve their differences or to utilize the mediation procedures set forth in 22

Pa. Code §16.64. Any compensatory education services in compliance with this Order must be in addition to Student's then current GIEP and may not be used to supplant recommended GIEP services.

H.O. Dec. @ 23 & 24.

B. Hearing Officer's Orders number 2 and number 3 are modified as follows:

- The School District shall immediately convene a Gifted Multidisciplinary Team to consider, determine and prepare a GIEP, responsive to the Student's gifted multi-disciplinary evaluation, and in full compliance with Pennsylvania's Chapter 16 requirements.
- The GIEP Team shall, after completion of an appropriate GIEP, determine an appropriate placement, keeping in mind the range of services authorized by Pennsylvania's Chapter 16 and all applicable BECs. If the GIEP Team recommends grade acceleration as part of the Student's appropriate programming and placement, such shall be determined; and the District shall take all necessary steps to effectuate this change well before the first day of the 2006-2007 school year.

All the District's Exceptions are denied. All Exceptions not expressly mentioned or addressed herein are hereby dismissed.

In accordance with 22 PA Code § 14.64(o), the parties are advised that this Order may be appealed to the Commonwealth Court of Pennsylvania.

Constance Fox Lyttle  
Constance Fox Lyttle, Ph.D., JD  
for the Appeals Review Panel

Electronic Mailing Date: June 15, 2006  
U.S. Postal Service Mailing Date: June 16, 2006

**NOTICE  
for  
Special Education Appeals Panel Opinion No. 1791:**

In a September 10, 2007, unreported Memorandum Opinion by Judge McGinley of the Commonwealth Court, Appeals Panel Decision #1791 was affirmed.

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

THE SPECIAL EDUCATION DUE PROCESS APPEALS REVIEW PANEL  
COMMONWEALTH OF PENNSYLVANIA

IN RE THE EDUCATIONAL ASSIGNMENT OF : SPECIAL EDUCATION OPINION  
D. D., A STUDENT IN THE NORTH PENN SCHOOL DISTRICT : NUMBER 1791

BEFORE APPEALS PANEL OFFICERS GONICK, LONICH, AND SALVIA  
OPINION BY SALVIA, APPELLATE OFFICER

BACKGROUND

D.D. (hereafter, student) is a gifted sixth grader who resides in the North Penn School District (hereafter, the District). Last year, while the student was in the fifth grade, his parents filed for a due process hearing because of a dispute over his educational program and placement. That hearing officer (hereafter HO#1) found that the District had failed to comply with the requirements of the law related to educating gifted students -- §16 of 22 Pa Code (hereafter §16). The District appealed this decision to a Special Education Appeals Panel which upheld HO#1's order in all important aspects.<sup>1</sup> Three of HO#1's five orders were unchanged.<sup>2</sup>

1. The School District shall complete a gifted multi-disciplinary evaluation of Student, including a evaluation report, within fifteen (15) days of the date of this Order or at least ten (10) days before the last day of the 2005-2006 school year, whichever is sooner. The evaluation report will be shared with the Parents within two (2) school days of its completion.
4. In the event that the GIEP [that is, a Gifted Individualized Educational Program] for the 2006-2007 school year requires continued association between Student and [another student], the School District is directed to investigate any complaints by Student or Student's Parents in a timely fashion. A School District official independent of those who were involved in the prior investigation process should be utilized to make this determination.

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<sup>1</sup> See Special Education Appeal No. 1737, District Exhibit (D) 3.

<sup>2</sup> D 1, p. 25.

5. The School District shall provide compensatory education services equaling three (3) hours per day for those days Student actually attended school since February 13, 2005 and for every day of attendance until a GIEP complying with Chapter 16 is in place. The School District shall provide Parents with a written accounting of the calculation of the hours of compensatory education due. Parents may make the initial selection of the form of the compensatory education so long as it represents any appropriate enriching instruction that furthers the goals of Student's 2006-2007 or future GIEPs and is within the curriculum of the School District. Should the GIEP Team be unable to agree with the Parents' selection, the parties are directed to engage in good faith efforts to resolve their differences or to utilize the mediation procedures set forth in 22 Pa. Code §16.64. Any compensatory education services in compliance with this Order must be in addition to Student's then current GIEP and may not be used to supplant recommended GIEP services.

The Appeals Panel modified the HO#1's second and third orders to read as follows.

2. The School District shall immediately convene a gifted Multidisciplinary Team to consider, determine and prepare a GIEP, responsive to the Student's gifted multi-disciplinary evaluation, and in full compliance with Pennsylvania's Chapter 16 requirements.
3. The GIEP Team shall, after completion of an appropriate GIEP, determine an appropriate placement, keeping in mind the range of services authorized by Pennsylvania's Chapter 16 and all applicable BECs. If the GIEP Team recommends grade acceleration as part of the Student's appropriate programming and placement, such shall be determined; and the District shall take all necessary steps to effectuate this change well before the first day of the 2006-2007 school year.<sup>3</sup>

Subsequently the District completed a multidisciplinary evaluation and prepared a Gifted Written Report (GWR). Gifted Multidisciplinary Team meetings were held on May 31, 2006, on June 14, 2006, and on June 28, 2006. At the last meeting, various placements were discussed. The middle school principal opined that it would be just as convenient to have Student take math and science at the middle school. It appears that the team agreed to a split placement with math and science being taken at the middle school and the Student's remaining program being at the elementary school. However, the coordinator for the gifted support program stated that he needed to check with the District before agreeing to this type of placement.<sup>4</sup> Subsequently, the District

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<sup>3</sup> S 3, p. 12.

<sup>4</sup> Notes of Testimony (NT), pp. 375/7,

recommended advancement to 7th grade and disapproved the split program.<sup>5</sup> About one month later, the coordinator set up another GIEP meeting the parents objected to the decision to advance Student to the 7<sup>th</sup> grade. Instead they insisted that the Student remain in 6<sup>th</sup> grade with "significant opportunities for challenge and enrichment in science, social studies, and language arts" as well as acceleration in mathematics.<sup>6</sup> The parents then filed for a due process hearing.

A due process hearing began on September 22, 2006 and ended one session later on October 20, 2006. At issue were the appropriateness of the GWR, the appropriateness of the GIEP, the appropriateness of the proposed educational placement, and compensatory education. The hearing officer at this hearing (hereafter HO#2) found that the GWR, GIEP, and proposed placement were appropriate and that compensatory education was unwarranted. In their timely exceptions to the opinion, the parents opined that HO#2 erred on all counts and urged her decision be reversed. For the reasons that follow, the panel reverses HO#2's order.

## DISCUSSION

Review by the panel of a hearing officer's decision requires an independent examination of the record evidence, as well as a determination of whether an error of law has been committed. Hearing officers have considerable discretion in assessing the credibility of witnesses and weighing evidence<sup>7</sup> unless the non-testimonial, extrinsic evidence in the record justifies a contrary conclusion or unless the record read in its entirety would compel a contrary conclusion,<sup>8</sup> however, their conclusions of law do not command the same deference.

### Law of the Case

Of importance in the current proceedings is HO#1's findings that the District failed to comply with its §16 obligations by failing to obtain appropriate present levels of educational attainment, by failing to provide appropriate specially designed instruction, and by failing to provide objective criteria of determining if the goals and objectives of the GIEP were being achieved.<sup>9</sup> HO#1 ordered the District (1) to complete a gifted multidisciplinary evaluation and GWR and (2) to prepare a new GIEP that complied with the requirements of §16. This order was appealed to a Special Education Appeals Panel.<sup>10</sup> In its opinion, that panel wrote that "While we agree with the Hearing

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<sup>5</sup> NT 388. We advise the parties that it is the GIEP team that determines placement, not the District.

<sup>6</sup> D 6.

<sup>7</sup> See *Colonial Gardens v. Commonwealth*, 382 A.2d 1273, 1275 (Pa. Commw. 1978).

<sup>8</sup> *Carlisle Area School District v. Scott P.*, 62 F2d 520 (3<sup>rd</sup> Cir. 1995).

<sup>9</sup> D 1.

<sup>10</sup> D 3.



Officer's analysis and conclusion concerning the inappropriateness of the GIEPs, we also find them procedurally and substantively inappropriate because they are not based upon, nor responsive to, a current GMDE and GWR. The GIEPs failed to include current levels of achievement, and, as such, appropriate goals could not be designed nor could progress be measured. Moreover, the GIEPs provided no measurable goals or objectives against which to gauge progress or determine present levels of achievement."<sup>11</sup> Thus, the District was put on notice in unambiguous and painful detail that it must conduct an appropriate multidisciplinary evaluation, that it must prepare a GIEP that is responsive to that evaluation and that must include current levels of achievement as well as measurable goals and objectives.

#### The GWR

As a result of the previous hearing and appeal, the District was obligated to conduct an appropriate evaluation. The District responded to this order with a GWR that indicated the following educational needs: opportunities for enrichment and/or advancement in math, technology, science, literature, and creative writing; opportunities to refine self-evaluation skills, research skills, higher level thinking skills, oral and written communication skills, creativity, and affective awareness skills. Thus, one would reasonably expect the Student's GIEP to address these needs.

#### The GIEP

§ 16.32(e) requires that the GIEP of each gifted student to contain several specific elements. Five are of particular importance to the GIEP offered by the District.<sup>12</sup>

#### Present Levels Of Educational Performance

Although the GIEP offered by the District provides some information about the Student's attainment in reading and mathematics, it fails to report current instructional levels, curricular content unmastered, or other information that could be used to established his level of educational performance within the curriculum. The GIEP fails to provide the Student's current instructional level in reading, fails to provide the Student's current instructional level in mathematics, indeed fails to provide the Student's current instructional level in any academic area. [Footnote: By way of dicta, we advise those who are unfamiliar with fundamental measurement concepts that scores of relative standing (e.g., standard scores and percentiles) only indicate how a student's raw score (e.g., number correct on a test or subtest) compares to the raw scores of other similar test takers. Thus, a score of relative standing gives no indication of the specific content a student knows or does not know. Grade and Age equivalents indicate the grade or age at which a student's raw score is the average (i.e., mean or median). These scores are not synonymous with instructional levels.] The section of

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<sup>11</sup> Ibid., pp. 9/10.

<sup>12</sup> D 7.

the GIEP labeled "Rates of Acquisition and Retention" provides no rates although such rates can be readily calculated with appropriate data. Finally, the section of the GIEP labeled "Specialized skills, interests and aptitude" asserts the Student has specialized knowledge in a variety of areas. However, the areas are so generally described as to be useless in planning a specific educational program.

Annual Goals And Short-Term Learning Outcomes Responsive To The Learning Needs Identified In The GWR

The student's GIEP lists three educational needs. 1. "Opportunities for enrichment and/or advancement in identified areas of strength including math, technology, science, literature, and creative writing." However, science and literature are not addressed in the GIEP. In addition, the other strengths identified in the Students GIEP were not addressed by GIEP goals: vocabulary knowledge and usage, music, and reading, and interpreting schematic drawings. Thus, we find that many areas of need and strength were ignored in the GIEP offered by the District.

Appropriate Objective Criteria and Assessment Procedures For Determining, Whether The Goals and Learning Outcomes Are Being Achieved

This portion of the GIEP suffers from at least three fatal flaws. First, there are no present levels of educational performance for the goals of "refining" grammatical skills, writing a research paper, creative writing, higher level thinking skills, team building skills, leadership skills, self monitoring of educational progress, basic Algebra I skills, higher level thinking skills, and technological skills. Of course, without present levels, it is impossible to know if the Student has refined these skills.

Second, the goals and objectives in GIEP lack objective criteria for determining success.<sup>13</sup> For example, the very first short-term learning outcome is that the Student "will enhance his ability to develop a paragraph through relevant details and concluding sentences. He will also continue the study of vocabulary and speech and integrate the study of punctuation and grammar."<sup>14</sup> The criteria for achieving this outcome is that the Student "will master these outcomes to an average of 90% or better each quarter." While 90% is objective, the outcomes themselves are not. (There are no objective measures of the Student's "ability to develop a paragraph ..." or "continue the study" or "integrate punctuation and grammar.") Clearly, 90% of something that is not objective cannot be objective just because the concept of 90% is objective.

In addition, the GIEP lists numerous evaluation techniques, most of which clearly cannot yield the objective results that are implicit in §16's requirement for

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<sup>13</sup> Because "objective" is not otherwise defined in §16, the panel accepts the common definition of the term, that is "uninfluenced by emotion, surmise or personal prejudice; based on observable phenomena." (See *The American heritage Dictionary, Second College Edition*. 1982. Boston: Houghton Mifflin.)

<sup>14</sup> D 7; Parent Exhibit 5.

objective criteria. For those unfamiliar with educational assessment, the panel offers the following observations. Many of the assessment procedures listed are not assessments at all: teacher assignments; student participation in a program; review of an assignment book; teacher made rubrics ; and papers, projects and presentations (although these activities can themselves be evaluated). Of the remaining procedures proposed by the District many are clearly subjective: teacher/student conferencing, student self evaluations, student/teacher reflection, and participation. Finally, the objectivity of the remaining types of assessment depend entirely upon the specific procedures used in the assessment. For example, observations, teacher-made tests, and publisher-made tests may be either objective or subjective.

#### Specially Designed Instruction

Because "instruction" is not otherwise defined in §16, the panel accepts the common definition of the term, that is "teaching." The things listed as "Specially Designed Instruction" in the Student's GIEP mostly include things that cannot be considered instruction: monitoring, opportunities, activities, projects, and peer review. Indeed, the only instruction that appears under the heading of specially designed instruction is "individual and group instruction." It is unclear how this could be considered to be specially designed.

#### Conclusions About The GIEP

HO#2 noted flaws in two objectives related to encouraging and refining skills as well as the absence of goals for science, social studies and music. In addition she noted the a lack of clear baseline data. She then concludes that the GIEP "when viewed in its totality" is not sufficiently flawed to "prejudice the Student." She reasoned that "most goals and objectives are written in compliance with Chapter 16 and are objectively assessed through tests and rubrics" and that "support services such as meetings with the guidance counselor and gifted teacher are offered to assist student with transition."<sup>15</sup> We find that the record as a whole and the non-testimonial extrinsic evidence compels a contrary conclusion.

HO#2's analysis of the issues was superficial and incorrect. First, the result of the first hearing for the Student was an order that the District prepare a GIEP that complied with the requirements of §16. Neither HO#1 or the Appeals panel ordered a GIEP that "sort of met the requirements" or "almost met the requirements" or "met some of the requirements." It is simply not possible to read these orders in any way that supports HO#2's conclusions. Finally, we note the obvious: HO#2 and this panel lack authority to rewrite the previous orders.

Second, even if HO#2 had the authority to ignore the orders from the previous hearings (and she does not), we would reject her legal reasoning when she found that a GIEP meets the standards set forth in §16 because (1) it is an improvement over a

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<sup>15</sup> HO#2 Opinion, p. 11.

previous unacceptable GIEP and (2) responsive to parent concerns are acceptable standards for evaluating a GIEP. We further reject her argument that deficiencies in a GIEP are not prejudicial if a student makes progress in some areas. Clearly, a GIEP must be responsive to a student's needs. Failure to address one or more of those needs renders that GIEP inappropriate and denies the student a free and appropriate public education (FAPE).<sup>16</sup>

Third, the GIEP offered by the District has obvious pervasive and severe shortcomings. The GIEP does not comply with the requirements of §16. Moreover, these limitations would result in a denial of appropriate services to the Student; if the GIEP were implemented, it would deny the Student FAPE.

#### Compensatory Education

In the prior hearing, HO#1 ordered 3 hours of compensatory education for every day of the Student's attendance from February 13, 2005 until a GIEP complying with §16 is in place. This order was affirmed by a Pennsylvania Appeals Panel and not appealed to Commonwealth Court. We find that the District has still failed to develop a GIEP that complies with §16. Thus, the compensatory education continues to accumulate as per the order of HO#1.

#### 7<sup>th</sup> Grade Placement

HO#2 has ordered that acceleration to 7<sup>th</sup> grade is appropriate. While her opinion cites the relevant portions of §16, it fails to explain how the law applies to the facts in this case. In short, she provides neither explanation or rationale for her order. On the other hand, we find that the case made by the parents to be persuasive: Split enrollment for the sixth grade is appropriate. In so doing, we specifically reject the District's rationales for denying this placement. "The District believed Student's needs exceed the elementary school curriculum which would require the elementary school teachers to supply enrichment at a middle school level when they are not certified to teach middle school."<sup>17</sup> We urge the District (and HO#2) to attend to §16.32(e): "Gifted education placement may not be based on one or more of the following: ... (2) lack of availability or efforts to make educational or support services available, (3) lack of qualified staff to provide the services set forth in the GIEP, ... (5) administrative convenience." Second, the District believed "placement at the middle school full time [was] appropriate because student will be around his cognitive peers throughout the

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<sup>16</sup> HO#2 cites Special Education Appeal No. 1564 as authority for her legal conclusions. However, the arguments set forth in 1564 simply do not apply to the present case. In 1564 the panel found the GIEP errors were not prejudicial. In the present case, HO#1 and the Appeals Panel found the errors committed by the District were substantive and prejudicial.

<sup>17</sup> HO#2 Opinion, ff 40.

day . . .”<sup>18</sup> This rationale ignores the Student’s social and emotional needs to be around same age peers as well as his access to appropriate extra curricular activities. Therefore, we shall order that the Student shall enroll for advanced mathematics and science at the middle school and receive the balance of his instruction (including gifted support, acceleration, and enrichment) within the elementary school for other subjects and activities. In so doing, we note the portion of Appeals Panel’s order dealing with acceleration (“If the GIEP Team recommends grade acceleration as part of the Student’s appropriate programming and placement, such shall be determined”) does not preclude a split placement and also cites the relevant portions of §16 that allows cross-grade grouping.

Dicta

This panel is appalled by the District’s lack of compliance with the requirements of Commonwealth regulations and due process orders. In the future we urge the District to be conscientious about discharging its legal responsibilities. Parents have every right to expect that the District to be fully compliant with the Commonwealth’s regulations and that hearing officers and Appeals panels will demand compliance with them.

We urge the parents and the District to work together to avoid future misunderstandings. For example, the parents should become familiar with District policies related to topics such as (1) counting advanced coursework prior to high school for high school graduation, (2) Student enrollment in college courses during high school, (3) availability of advanced placement courses, and so forth.

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<sup>18</sup> HO#2 Opinion, ff39.

ORDER

Accordingly, this 8th day of January, 2007, HO#2's order is reversed, and those exceptions not addressed in this order are dismissed.

1. The GIEP offered to the Student was inappropriate because it failed to address all areas of the Student's needs, lacked current educational levels, lacked objective criteria, and clear goals.
2. Cross grade placement in mathematics and science is appropriate and shall be made. The District shall take all necessary steps to allow for a smooth transition to the accelerated curricula.
3. Compensatory education (as specified in HO#1's order and Special Education Appeal No, 1737) continues to accrue until an appropriate GIEP is offered.

In accordance with 22 PA CODE Sec. 16.63(l), the parties are advised that this matter may be appealed to the Commonwealth Court of Pennsylvania.

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John Salvia, D.Ed.  
for the Appeals Panel

Date signed *9 January 2007*

Date mailed *9 January 2007*

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

North Penn School District, :  
Petitioner :  
 :  
v. :  
 :  
James D., and Adelle B., :  
Parents and Natural Guardians of :  
D.D., : No. 278 C.D. 2007  
Respondents : Submitted: July 13, 2007

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge  
HONORABLE DAN PELLEGRINI, Judge  
HONORABLE MARY HANNAH LEAVITT, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY JUDGE McGINLEY

FILED: September 10, 2007

North Penn School District (District) appeals the order of the Pennsylvania Special Education Due Process Appeals Panel (Panel) which reversed an order of a Special Education Hearing Officer and found that D.D. (Student), a gifted student, was entitled to cross-grade placement and compensatory education.

Student is an eleven year old, sixth grade student who resides with his parents, James D. and Adelle B., (Parents) in the District. Student is a “gifted student” who is currently eligible for specially designed instruction and support

services under Chapter 16 of Title 22 of the Pennsylvania Code, 22 Pa. Code §16 (Chapter 16), the regulations relating to special education for gifted students.<sup>1</sup>

### **22 Pa. Code §16**

Chapter 16 contains the State Board of Education's regulations which govern the identification and education of gifted students. The regulations set forth the procedures school districts must use to identify gifted students and ensure they are provided with quality gifted education services and programs. Each school district is required to provide the following:

- (1) Services and programs planned, developed and operated for the identification and evaluation of each gifted student.
- (2) Gifted education for each gifted student which is based on the unique needs of the student, not solely on the student's classification.
- (3) Gifted education for gifted students which enables them to participate in acceleration or enrichment programs, or both, as appropriate, and to receive services according to their intellectual and academic abilities and needs.

22 Pa. Code §16.2(d).

A "gifted student" is defined in 22 Pa. Code §16.1 as:

A student who is exceptional under section 1371 of the [Public] School Code (24 P.S. §13-1371) because the student meets the definition of 'mentally gifted' in this section, and needs specially designed instruction beyond that required in Chapter 4 (relating to academic standards

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<sup>1</sup> In Pennsylvania, special education is afforded to gifted children pursuant to Sections 1371 and 1372 of the Public School Code of 1949, Act of March 10, 1949, P.L. 30, *as amended*, 24 P.S. §§13-1371, 1372.



and assessment). This term applies only to students who are of ‘school age’ as defined under §11.12 (relating to school age).

“Mentally gifted” is defined in 22 Pa. Code §16.1 as:

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.

Chapter 16 regulations require each school district to adopt and use a screening and evaluation process to identify students who may be gifted. 22 Pa. Code §16.21. Mentally gifted students include a person who has an IQ of 130 or higher and when multiple criteria indicate gifted ability. Criteria used to indicate gifted ability include nationally normed and validated achievement tests. Those test results “shall yield academic instruction levels in all academic subject areas.” 22 Pa. Code §16.21(e)(1) (Emphasis added).

Once a student is identified as gifted and the screening and evaluation process is completed, the school district is required to appoint a team of individuals to meet and develop a Gifted Individualized Education Program (GIEP) for the student based on the data and information gathered during the evaluation and assessment phase. 22 Pa. Code §16.32(a). A GIEP refers to the written plan which describes the education to be provided to a gifted student. 22 Pa. Code §16.31(a). The GIEP must contain the following information:

- (1) A statement of the student’s present levels of educational performance.
- (2) A statement of annual goals and short-term learning outcomes which are responsive to the learning needs identified in the evaluation report.

- (3) A statement of the specially designed instruction and support services to be provided to the student.
- (4) Projected dates for initiation and anticipated duration of gifted education.
- (5) Appropriate objective criteria, assessment procedures and timeliness for determining, on at least an annual basis, whether the goals and learning outcomes are being achieved.
- (6) The names and positions of GIEP team participants and the date of the meeting.

22 Pa. Code §16.32(e) (Emphasis added).

Parents may request in writing an impartial due process hearing if they disagree with the school district's identification, evaluation or educational placement of, or the provision of a gifted education to, a student who is gifted. 22 Pa. Code §16.63(a).

Here, there is no dispute that Student qualifies as a gifted student and requires specially designed instruction and support services. The present controversy concerns the sufficiency of District's most recent GIEP developed for Student and the appropriateness of its determination of Student's educational placement.

### **Parents' Request for Due Process Hearing**

In October 2001, Student was identified in the first grade as being eligible for specially designed instruction as a gifted student. Student was placed in the "generic" gifted program, with no individualized program tailored to his particular needs. Notes of Testimony, April 2, 2006 (N.T. 4/2/06), at 8;

Reproduced Record (R.R.) at 332a. Subsequent GIEPs prepared for Student did not change; the goals did not change, there was no individualization. N.T. 4/2/06 at 9; R.R. at 332a.

In the middle of the fourth grade, in February 2005, Student was assessed using the TerraNova. Student scored in the 99<sup>th</sup> percentile in every subject tested: reading, language and mathematics. N.T., 4/2/06 at 10; R.R. at 333a. Again, nothing was done by the school district to attend to Student's individualized needs. There was no specially designed instruction, no course compaction and no individualization in the regular class room. N.T. 4/2/06 at 8; R.R. at 332a.

During the 2005-2006 school year when Student was a fifth grader, Parents became concerned that Student did not have to study to earn perfect grades. He often completed his homework before he got home and complained that he was bored as school. Parents believed Student was not being challenged by the work and worried that he was forming bad work habits. Parents attempted to obtain acceleration in math and language arts for Student. Toward the end of the school year when Parents were unable to procure advancement for Student in math and language arts, Parents filed for a due process hearing pursuant to 22 Pa. Code §16.63, and alleged a denial of a "free appropriate public education" (commonly referred to by the acronym "FAPE").

Parents alleged that for some time the District failed to provide an appropriate program under Chapter 16 and they requested immediate grade acceleration for the 2006-2007 school year.

### **First Due Process Hearing**

A due process hearing was held on April 4, and 11, 2006. Parents argued that the District's most recent GIEP was deficient and that it was neither individualized nor specially designed to suit Student. The last GIEP had been done in 2004, and while it consisted of all the relevant parts of Chapter 16, it failed to provide any objective criteria to determine whether the goals and learning outcomes were being achieved. For example, the "Present Educational Levels" portion of the GIEP provided only report card grades, with no indication whether Student was reading at a fourth, fifth or sixth grade level. The "Annual Goals" portion of the GIEP were boilerplate and superficial and could have applied to any student. There was no indication why goals were set or what criteria was used to identify them.<sup>2</sup>

The District maintained that additional testing was required to determine whether Student should be accelerated. The District claimed that reevaluation was not done because Parents did not sign the necessary forms. According to the District, Student's needs were addressed in a pull-out gifted setting as well as in the regular classroom.

Student's principal testified that Student was one of the highest achieving fifth graders, although he conceded that current data was needed to determine whether advancement or acceleration should be made in any subject areas.

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<sup>2</sup> Only select excerpts of the first due process hearing transcript are included in the reproduced and certified records.

### Hearing Officer #1's Decision

The Hearing Officer (Hearing Officer #1) found the District “miserably” failed to comply with its obligations under Chapter 16 of the state regulations pertaining to gifted education. Hearing Officer #1 found the District’s GIEP was inadequate because it failed to provide any “objective criteria for determining whether the goals and learning outcomes [were] being achieved.” Hearing Officer #1 Decision, May 4, 2006, at 4; R.R. at 310a. “The goals and outcomes should be child-specific and measurable but they [were] not.” *Id.* at 17; R.R. at 323a.

Hearing Officer #1 concluded that Student was “denied appropriate specially designed instruction to enable him to benefit meaningfully during the second half of the fourth grade year and the entire fifth grade year.” *Id.* at 14; R.R. at 320a. Hearing Officer #1 determined that a reevaluation was necessary since a formal evaluation of Student had not been conducted for over four years.

Hearing Officer #1 ordered the District to (1) complete a gifted written report (GWR); (2) convene a Gifted Multidisciplinary Team (Team) to determine if Student should be accelerated for 2006-2007 school year; (3) prepare a GIEP which complied with the requirements of Chapter 16.

The Hearing Officer also determined that Student was entitled to the equitable remedy of “compensatory education services”<sup>3</sup> equaling 3 hours per day

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<sup>3</sup> When a gifted child is denied a free appropriate public education, compensatory education may be an appropriate remedy for the District's failure to provide an adequate educational program. Brownsville Area Sch. Dist. v. Student X, 729 A.2d 198 (Pa. Cmwlth. 1999). Compensatory education's purpose is to fairly compensate the student whose school **(Footnote continued on next page...)**

for those days Student attended school since February 13, 2005, (which corresponded to the date when the District should have acknowledged and remedied the lack of a necessary reevaluation), and for every day of attendance until a GIEP complying with Chapter 16 was in place. The District agreed to comply with the Decision, except for the compensatory education part of the decision, which was subsequently affirmed by the Panel, with minor modifications.

**Post Due Processing Hearing Evaluations  
And Recommendations**

Student's reevaluation testing took place the week of May 15-19, 2006. On the Wechsler Intelligence Scale for Children, Fourth Edition, Student's full scale I.Q. was 145, which is considered "very superior intellectual functioning." The psychologist who administered the test indicated that in her 10 years' experience, only one other student scored 145 or better. Notes of Testimony, September 22, 2006, (N.T. 9/22/06) at 155; R.R. at 217a.

Student obtained a score in the superior range on the Verbal Comprehension Index, which measures verbal reasoning skills, vocabulary knowledge and social common sense reasoning and a score within the "very superior range" on the Perceptual Reasoning Index, which measures non-verbal reasoning and visual spatial skills. He scored in the "high average range" on a test which measured social reasoning skills. On the Perceptual Reasoning subtests, he scored in the "very superior range" on all three subtests. Student's Working

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**(continued...)**

district has failed to provide the student a free appropriate public education. Id. at 200. In the context of gifted education, the compensatory education award must be limited to the education available within the curriculum of the school district. Id.

Memory Index score, which measures ability to take information, store it, and use it, was also in the “very superior range.” The psychologist explained that these types of tests predict a child’s ability to learn. In this case, “we have a child who is predicted to achieve at a very high level.” N.T. 9/22/06 at 156; R.R. at 217a.

The District also administered the Burnes and Row Informal Reading Inventory to assess Student’s reading level. Student demonstrated scores above 80% in words in isolation up to the 10<sup>th</sup> grade level. Regarding reading comprehension, Student scored independent at the 8<sup>th</sup> grade level. N.T. 9/22/06 at 157-158; R.R. at 217a-218a.

In the Test of Mathematical Abilities for Gifted Students, he scored in the “very superior range.” He obtained a “perfect raw score” on this test. In the CTP III Achievement Test, Student scored in the “99<sup>th</sup> percentile” on both the Mathematics section and Algebra I. The first test compared Student to the normal population, and the other to a population of just gifted students. N.T. 9/22/06 at 159; R.R. at 218a. Because Student had a perfect raw score, “his potential could be even higher...the test wasn’t able to measure all of his potential.” Id.

A GWR was developed and a Team meeting was held on May 31, 2006. The Team recommended that Student skip 6<sup>th</sup> grade and be placed in 7<sup>th</sup> grade at Penfield Middle School for the 2006-2007 school year.

In a letter dated June 14, 2006, Parents disagreed with the GWR’s recommendation to accelerate Student to 7<sup>th</sup> grade. Instead, Parents requested that Student attend 6<sup>th</sup> grade during the 2006-2007 school year with “significant opportunities for challenge and enrichment in science, social studies, and language

arts.” Letter to Todd Dukeman, Administrator of Gifted Program, North Penn School District from Parents, June 14, 2006, at 1; R.R. at 359. Parents also requested that Student be accelerated in math.

GIEP meetings were held on June 27, 2006, and July 27, 2006. The Team participants included the principals for the elementary school and the middle school, the gifted support chairperson for the middle school and the math department coordinator, and Student’s 5<sup>th</sup> and 6<sup>th</sup> grade math teachers. A GIEP was prepared.

At the end of the July 27, 2006, GIEP meeting, the Team decided that Student’s placement would be in 7<sup>th</sup> grade at the middle school, with gifted support. It was also determined that Student should be placed in Algebra I, a class normally taken by 9<sup>th</sup> graders. Gifted Individualized Education Program, 2006-2007, at 1-12; R.R. at 363a-374a.

Parents did not approve the Team’s recommendation of full acceleration to 7<sup>th</sup> grade and they objected to the GIEP as incomplete. Instead, Parents requested a split schedule where Student would attend the middle school for science and math and attend the elementary school for the rest of Student’s academics. Parents voiced Student’s desire to remain in 6<sup>th</sup> grade in their request. A second Due Process Hearing was scheduled.

### **Second Due Process Hearing**

Parents appeared *pro se*. The District was represented by counsel. The District requested that the Hearing Officer approve its GIEP. It asserted that it did what it was directed to do by Hearing Officer #1. The District obtained new



data, had ongoing discussions with Parents, held multiple GIEP meetings and crafted a GIEP tailored to ensure educational benefit for Student at the middle school.

The District presented testimony from Todd Dukeman (Mr. Dukeman) the District's administrator of the gifted program; Donna Edmunds (Ms. Edmunds), the psychologist who conducted the evaluation of Student; and Donna Mower (Ms. Mower), the gifted support teacher who would oversee Student at the middle school.

Based on the results of the reevaluation, the District concluded Student's cognitive ability far exceeded that of his 6<sup>th</sup> grade peers. The District agreed with Parent's original recommendation that Student was in need of full grade acceleration, which is a form of special instruction under the guidelines. The District did not agree with Parents that Student be instructed part of the day in the middle school and part of the day in the elementary school.<sup>4</sup> The District believed that Student's needs exceeded the elementary school curriculum which would require the elementary school teachers to supply enrichment at a middle school level when they were not certified to teach middle school. Acceleration to 7<sup>th</sup> grade would put Student with his cognitive peers and around teachers who are certified to instruct the classes at Student's level of engagement. The District also believed Student would have no trouble adapting to the acceleration because he had previously been exposed to older students through extracurricular activities such as band, and his Parents agreed Student is mature and adapts well to change.

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<sup>4</sup> In the District, the elementary school ends at the end of sixth grade and the middle school begins at seventh grade.

Parents attempted to establish, through cross-examination of the District's witnesses, that (1) the District's evaluation of Student was inappropriate because appropriate testing was not performed in academic areas such as reading, science, social studies and written expression; (2) the GIEP was still deficient because there were no specific goals for science, social studies, or music<sup>5</sup>; (3) it did not list the present levels of educational performance for math reasoning, math calculations or written expression.<sup>6</sup>

Although Student's mother previously advocated full grade acceleration, she no longer believed that was the best alternative.

#### **Hearing Officer #2's Decision**

Hearing Officer #2 identified the following four issues: "(1) was the GWR [Gifted Written Report] appropriate? If so, is further testing necessary? (2) Was the GIEP offered to Student inappropriate? (3) Was the 7<sup>th</sup> grade placement offered inappropriate for Student? (4) Is Compensatory Education required?" Hearing Officer #2 Decision, November 19, 2006, at 7; R.R. at 51a.

#### **District's Evaluation of Student (GWR)**

Hearing Officer #2 found that the District conducted the appropriate evaluation of Student, and that no further testing was necessary at that time. She explained: "standardized tests provide only estimates of performance subject to

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<sup>5</sup> 22 Pa. Code §16(e)(2) requires that the GIEP contain "statement of annual goals and short-term learning outcomes which are responsive to the learning needs identified in the evaluation report."

<sup>6</sup> 22 Pa. Code §16.31(a)(1) requires that the GIEP contain a "statement of the student's present levels of educational performance."

reliability problems especially where one assessment (i.e. intelligence) is used to predict another (achievement). This is precisely the reason for continuous curriculum-based assessment.” (citing In Re: the Educational Assignment of E.D., a Student in the Lower Merion School District, Special Education Appeal Opinion Number 1564, January, 2005). Hearing Officer #2 Decision, November 19, 2006, at 8; R.R. at 52a.

Hearing Officer #2 noted that Student’s gifted evaluation consisted of information from “a variety of evaluation tools”, including standardized tests, informal assessments, curriculum based assessments, academic checklists, rating scales, subjective input provided by parents and teachers, reading and written expression. By using a variety of tools to evaluate Student in many academic and non-academic areas the District provided “a thorough look” into Student’s abilities. Hearing Officer #2 Decision, November 19, 2006, at 8; R.R. at 54a.

#### The GIEP

Hearing Officer #2 then reviewed the GIEP to determine if it complied with Chapter 16 requirements. Hearing Officer #2 noted that the GIEP was flawed in a “few areas.” Two objectives of the GIEP which related to enhancing and refining Student’s skills only encouraged Student to participate in extracurricular activities. Second, there were no specific goals for science, social studies, or music. Finally, baselines for many of the goals were not clearly stated in the goal itself or in present levels of educational performance.

Hearing Officer #2 found that these flaws, however, did not rise to the level of prejudice to Student.

[W]hen viewing the GIEP in its totality to ascertain whether the GIEP was reasonably calculated to yield meaningful benefit, the flaws do not rise to the level of prejudice of Student. Most goals and objectives are written in compliance with Chapter 16 and are objectively assessed through tests and rubrics. Support services such as meetings with the guidance counselor and gifted teacher are offered to assist Student with transition. The offered placement - grade acceleration to 7<sup>th</sup> grade, placement in a math course designed for 9<sup>th</sup> graders, enrichment in all academic areas through placement with his gifted peers, and a compacted curriculum, if necessary – was individually designed to meet Student’s advanced abilities in all academic areas and was reasonably calculated to yield meaningful benefit and progress.

Hearing Officer #2 Decision, November 19, 2006, at 11; R.R. at 55a. (Emphasis added).

Hearing Officer #2 concluded that the GIEP was appropriate and that placement in the 7<sup>th</sup> grade was appropriate.

#### Compensatory Education

Finally, Hearing Officer #2 concluded that, although the GIEP was not perfectly crafted, Student was offered free and appropriate public education reasonably calculated to yield meaningful benefit. Therefore, Student was not entitled to compensatory education after July 27, 2006, the date the District offered an appropriate GIEP and placement to Student. Hearing Officer #2 Decision, November 19, 2006, at 12; R.R. at 56a.

#### **Parents’ Appeal to the Panel**

Parents filed exceptions to Hearing Officer #2’s Decision. They maintained the District’s evaluation of Student, i.e., the GWR, was still inadequate

because it failed to indicate Student's present educational levels (e.g., he tested at the 9<sup>th</sup> grade level for reading, the 9<sup>th</sup> grade level for math, etc).

They also asserted that the GIEP remained deficient because it (1) failed to include any input from a 7<sup>th</sup> grade teacher; (2) it was not "appropriately responsive to Student's strengths in math, music and literature." Specifically, Parents noted that Student scored a perfect raw score on the Test of Mathematic Abilities for Gifted Students and 99<sup>th</sup> percentile scores on the standardized CTPIII mathematics test which included Algebra I. Yet, Student was placed in Algebra I "because it was the highest math course normally offered to 7<sup>th</sup> graders" even though testing indicated that he likely had mastered Algebra I. Parents' Exceptions to Hearing Officer #2's November 19, 2006, Decision, at 4; R.R. at 41a. Music was not even mentioned in the GIEP and there were no music goals. As to Student's "literature discussion needs" the only goal proposed was participation in the extra-curricular activity, Reading Olympics; there were no regular classroom curriculum goals in this essential area. With respect to technological skills, the GIEP provided that Student will "begin to develop" technological skills with particular reference to Power Point, Excel, and Web Design. Parents believed this was meaningless because Student already had experience working with Power Point and Excel from his elementary school EZ-Tech computer lab.

Finally, Parents believed 7<sup>th</sup> grade placement was inappropriate for Student because it was against Student's wishes. Student had expressed his desire to graduate with his 6<sup>th</sup> grade friends and he was eager to learn about 6<sup>th</sup> grade subjects in social studies (e.g. world history) and science (magnets and motors, solar energy and light).

Based on the above arguments, Parents requested that compensatory education continue and accrue at the rate set forth in Hearing Officer #1's Decision. They further requested additional testing, curriculum based assessments and/or tests "that will determine appropriate educational levels and baselines" (so that Student's progress could actually be measured), especially in the area of math. They also requested that the GIEP Team be reconvened and include school personnel knowledgeable of the "proposed" curriculum. Parents' Exceptions to Hearing Officer #2's November 19, 2006, Decision, at 6; R.R. at 43a.

### **Appeal Panel's Decision**

The Panel reversed Hearing Officer #2's Decision. It found that the GIEP offered to Student was inappropriate because it failed to address all areas of the Student's needs, namely science, literature, vocabulary knowledge and usage, music and reading and interpreting schematic drawings.

The GIEP also lacked current educational levels, and objective criteria and goals to monitor Student's baseline and success. Specifically, the GIEP identified as one of the goals: "refining grammatical skill, writing a research paper, creative writing, higher level thinking skills, team building skills, leadership skills, self monitoring of educational progress, basic Algebra I skills, higher level thinking skills, and technological skills." However, because present levels of educational performance were lacking, there was no baseline from which to monitor whether Student was achieving those goals. Hearing Officer #2 Decision, January 9, 2007, at 5; R.R. at 8a.

The GIEP was also to include "specially designed instruction" tailored to Student. Specially designed instruction is measured against the curriculum

that a student would otherwise receive in the regular education classroom. The Panel noted that several procedures did not amount to “instruction” or “teaching”, e.g., monitoring, opportunities, activities, projects, peer review. The only “special instruction” identified was “individual and group instruction.” The Panel concluded the GIEP was not clear about “specially designed instruction.” Hearing Officer #2 Decision, January 9, 2007, at 6; R.R. at 9a.

The Panel rejected Hearing Officer #2’s conclusion that acceleration to 7<sup>th</sup> grade was appropriate because she ignored Student’s social and emotional needs to be around peers his same age, as well as his access to appropriate extra curricular activities. The Panel ordered that Student enroll for advanced mathematics and science at the middle school, and receive the balance of instruction, including gifted support, acceleration and enrichment, at the elementary school.

With respect to compensatory education, the Panel ordered that compensatory education be continued to accumulate per the decision of Hearing Officer #1 because the District had yet to develop a GIEP that complied with Chapter 16.

### **District’s Appeal to This Court**

The District raises five issues on appeal<sup>7</sup>: (1) whether the Panel erred in placing the burden of proof on District; (2) whether the Panel erred by ordering

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<sup>7</sup> This Court’s scope of review of an order of the Panel is limited to determining whether constitutional rights were violated, whether an error of law was committed, or whether the necessary findings of fact are supported by substantial evidence. York Suburban School District v. S.P., 872 A.2d 1285 n. 4 (2005).

cross-grade placement when that was not one of the issues considered by Hearing Officer #2; (3) whether the Panel erred when it concluded that the District's GIEP was inappropriate; (4) whether the Panel erred when it concluded that the District's 7<sup>th</sup> grade placement as inappropriate; and (5) whether the Panel erred when it ordered compensatory education to continue to accrue from July 27, 2006, to the present.

**I.**  
**Burden of Proof**

The District contends that Hearing Officer #1 and the Panel improperly placed the burden of proof on the District instead of on the Parents, the parties seeking relief in this matter.<sup>8</sup>

The Panel's Decision did not address which party bore the burden of proof.<sup>9</sup> The District merely assumes from the "Panel's obvious lack of reference to or recognition of" the burden of proof issue, that the Panel allocated the burden of proof to the District. The District, however, has not made one single argument that supports their contention. Pages 13-15 of its Brief are devoted to an academic discussion of why the burden of proof *should be* on the moving party in Chapter 16 cases. In its remaining argument on this issue, the District goes on to analyze the evidence, or lack thereof from the Parents. The District claims that since Parents

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<sup>8</sup> Hearing Officer #1 expressly stated that the District had the burden of proof. However, because the District prevailed before Hearing Officer #1, it did not appeal the burden of proof issue to the first Panel.

<sup>9</sup> Recently, in E.N. v. M. School District, \_\_ A.2d \_\_, WL 2001695 (Pa. Cmwlth. 2007), this Court addressed who bears the burden in gifted proceedings and Chapter 16. We held that, given the silence of Chapter 16, general administrative law procedures would apply and would place the initial burden on the moving party.



placed little or no evidence in the record, they “could not have met their burden.” District’s Brief at 15.

First, the District’s appraisal of the evidence goes to its weight and has no bearing on whether the Panel allocated the burden to the District. Second, there is no indication that the Panel erroneously allocated the burden of proof to the District. There are no remarks by the Panel that the “District failed to prove” or the “District failed to meet its burden” or anything of that nature.

The District points to nothing in the Panel’s decision which even remotely suggests that it did anything other than appropriately rely on the record and weigh the evidence.<sup>10</sup>

## **II.** **Panel’s Consideration and Order of Cross-Grade Placement**

The District contends that the Panel should not have considered or ordered cross-grade placement because it was not considered by Hearing Officer #2. The District contends that the suitability of cross-grade placement was not one of the four enumerated issues considered by Hearing Officer #2 and the Panel, *sua sponte*, found such a program appropriate. The District further argues, unconvincingly, that “at no point was the District put on notice that it had the burden to prove that cross-grade placement was in fact inappropriate.” District’s Brief at 10.

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<sup>10</sup> It is noted that the Appeals Panel, not the hearing officer, is the final arbitrator of fact and the Appeals Panel is obligated to make an independent review of the evidence. York Suburban School District.

First, this Court finds cross-grade placement was considered, but rejected, by Hearing Officer #2. Hearing Officer #2 specifically indicated that one of the issues before her was whether “7<sup>th</sup> grade placement offered was inappropriate for Student?” Obviously, subsumed within that issue was whether the only other alternative proposed, i.e., cross-grade placement, was better suited for Student.

Moreover, the record reveals that Parents filed a Due Process Hearing Request on August 28, 2006, which adequately identified the issue. Parents rejected the District’s recommendation of acceleration to 7<sup>th</sup> grade at the middle school and specifically identified their alternative resolution as:

Parents Resolution: **math and science at the middle school.; remainder of subjects at the elementary school with enrichment as necessary;** 6<sup>th</sup> grade science class with a specific teacher instructed after the school day; 7<sup>th</sup> grade Gifted Social Studies and 7<sup>th</sup> Grade English individually instructed by specifically named teachers during the summer of 06-07; and grade acceleration to 8<sup>th</sup> grade for the 07-08 school year.

Due Process Hearing Request, August 28, 2006, at 2; R.R. at 300a (Emphasis added).

Furthermore, the District was most certainly aware before the second due process hearing that cross-grade placement was an alternative that Parents believed was appropriate and wished Hearing Officer #2 to consider. Based on the District’s direct examination of its witnesses it was obvious that the District disagreed with this placement and presented, at every opportunity, evidence to

negate the placement at the second hearing. Clearly, Hearing Officer #2 heard this testimony and considered the alternatives.

For example, District's counsel expressly addressed Parent's proposed cross-grade placement, which he described as a "hybrid program", in his opening statement:

**ATTORNEY FITZGERALD: As this Hearing Officer will soon discover, the Parents are proponents of a hybrid program where the student receives some instruction at the middle school as well as some instruction at the elementary school.**

**The District would submit such a proposal is inherently inappropriate** based both on Chapter 16 and the guidelines from the Department of Education. Consider the fact that at the most basic level, a student like [Student] requires specially designed instruction that is appropriate based on his skill level and consider the specially designed instruction versus his skill level and his current age peers.

As I noted earlier, a form of specially designed instruction can include acceleration in the regular ed environment with peers that are on his cognitive level. Now, if the re-evaluation of the student, which all parties will hear a great deal about over the course of his hearing, clearly indicates the student is functioning well above the cognitive level of his current age peers, **how could the District or the Parents justify a hybrid program where the student will be instructed part of the day in the middle school and part of the day in the elementary school?**

**The argument can be made that the whole experience at the elementary school at this point is inappropriate. He is well above his peers and, quite frankly, when you have a student who functions multiple years above grade level, there is only so**

**much modification that can be accomplished at the elementary school with its curriculum.**

Based on the testimony of District witnesses, it will become clear that the middle school placement provides the student several key facts in ensuring an appropriate gifted program. Consider resources.

The middle school has the teachers who can implement a GIEP for a student functioning at the level [Student] demonstrates. The middle school has the material opportunities, both in the regular education environment and the gifted program that will truly enrich the student on a daily basis; however, probably the most important thing is, and this sometimes can be underscored, the middle school has the peers on [Student's] cognitive level.

In making his programmatic decision the District recognizes it must program for the student with the peers that are on his level. Those peers do not exist in the elementary school. They now exist in the middle school.

Notes of Testimony, September 22, 2006 (N.T. 9/22/06), at 25-28; R.R. at 184a-185a. (Emphasis added).

Mr. Dukeman, the District's administrator of the gifted program, testified on *direct* examination that he did not agree with Parent's recommendation of a "hybrid program." N.T. 9/22/06 at 74; R.R. at 197a. He explained:

**Q. Did the District view the Parents' proposed [cross-grade program] as appropriate?**

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**A. No. We did not view the program as appropriate.**

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**A. Why I do not favor the split schedule is, we're looking at teachers who would then be asked – who are certified for K through six. Now we're asking**

**them to take on a little bit more and supply enrichment activities for a child who is superior, extremely intelligent, that should be at the middle school level.**

**So, we're asking elementary school people to instruct a student at the middle school level. He has no cognitive or very few cognitive peers at the elementary level. Elementary programming would be inappropriate at this time.**

N.T. 9/22/06 at 74, 81; R.R. at 197a-198a (Emphasis added).

Ms. Mower was asked by District's counsel on *direct* examination whether she believed cross-grade placement was appropriate for Student:

**Q. There has been some discussion prior to this hearing and during this hearing about a proposed split schedule where the Student spends some time at the middle school for some classes and is at the elementary school for other classes. Do you have an opinion with regard to the appropriateness of that type of program?**

**A. I think that's not the most appropriate program for [Student].**

Q. Why?

A. I think one of the main things that would be missing with that type of a program would be the team concept, and I think that's a real benefit to the seventh grade program, that we have the team concept. The teachers get to know the students very well and they work together to do interdisciplinary projects; they've looked at the curriculum and see where things line up where they can read a book in English that's related to what they're studying in history; they do team building activities where they get the students together and do

more of a social-type of activity or a problem-solving activity together and the kids get to know each other.

**And I think that is what would really be lacking if there was a split schedule.** He would be missing the benefit of the team building and team concept.

Notes of Testimony, October 20, 2006, at 290-291; R.R. at 103a-104a.

Based on a careful review of record, this Court rejects the District's contention that the Panel raised the issue of cross-grade placement *sua sponte* as the record plainly indicates that Parents specifically raised the issue before Hearing Officer #2, and the District countered with evidence throughout the hearing that such placement was inappropriate. Hearing Officer #2 obviously rejected the notion of cross-grade placement when she decided in favor of the District that 7<sup>th</sup> grade acceleration was appropriate. The District's argument that it was denied the opportunity to address cross-grade placement is rejected as specious.

### **III.**

#### **Whether the District's GIEP was Inappropriate to Meet Student's Gifted Needs**

Next, the District asserts that the Panel erred as a matter of law when it reversed Hearing Officer #2's finding that the GIEP offered by the District was appropriate to meet Student's gifted needs.

The District contends that the Panel should have deferred to Hearing Officer #2's credibility determinations because there was no evidence in the record which justified a contrary conclusion. The District believes that a "low standard" must be applied when determining if a school district offered the student an appropriate gifted education program. It claims that overwhelming evidence

supported that it met its obligations by providing Student with a program that is responsive to his needs and calculated to provide him with meaningful educational benefit. According to the District, it administered the proper tests and assessments in the GWR and that Student's objective scores indicate the need to accelerate to 7<sup>th</sup> grade in all subject matters.

It is well settled that a school district is not required to devise an educational program which makes the best use of each student's abilities, but only to identify exceptional children and develop educational programs appropriate to their particular needs. Shanberg v. Secretary of Education, 426 A.2d 232 (Pa. Cmwlth. 1981). The determination of whether or not a program is appropriate depends upon how well the program satisfies the recognized needs of the individual child. Centennial School District v. Commonwealth Department of Education, 503 A.2d 1090 (Pa. Cmwlth. 1986), *affirmed by* Centennial School District v. Commonwealth Department of Education, 517 Pa. 540, 539 A.2d 785 (1988).

Chapter 16 provides the standards for the GIEP. The requirements are mandatory and designed to ensure the program satisfies the recognized needs of the gifted student. Therefore, it is not sufficient for a GIEP to “sort of meet the requirements” or “almost meet the requirements” or “meet some of the requirements.” A district is hard-pressed to establish that a GIEP that does not meet the requirements of Chapter 16 satisfies the recognized needs of the child.

#### 1. Present Levels of Educational Performance

In this case, the Panel went through the GIEP and exposed numerous flaws. During the screening and evaluation process, any nationally normed or

achievement tests used to evaluate a potential gifted student *must* yield “academic instruction levels in all academic subject areas.” 22 Pa. Code §16.21(e)(1). The GIEP must also include “a statement of the student’s present levels of educational performance.” 22 Pa. Code §16.32(e)(1).

Because the goal is to identify and meet the needs of students with gifted abilities, a high IQ score, alone, is not enough. That is why it is so important to decipher grade achievement levels during the evaluation to reflect whether the student is above the normal age group in any one or more subjects. Similarly, when preparing the GIEP, Chapter 16 regulations oblige the district to first establish where the student is academically, so that annual and short-term goals and a plan to achieve those goals are established. This makes perfect sense. Without a measured starting point, any identified goals and specially designed instruction are superficial.

One of Parents’ main concerns was that they did not know where their son was academically, before or after the District’s evaluation. Therefore, they did not believe that they could approve overall acceleration to 7<sup>th</sup> grade, especially because Student was already achieving at higher levels than the 7<sup>th</sup> grade curriculum in certain subjects.

The Panel agreed with Parents that the GIEP lacked the “present level of educational performance” criterion. Specifically, the Panel concluded that the GIEP failed to report “current instructional levels”, “curricular content unmastered” or other information that could be used to establish Student’s level of educational performance within the curriculum in reading, math, or in any academic area. The Panel explained that “scores of relative standing (e.g.,



standard scores and percentiles) only indicated how a student's raw score (e.g., number correct on a test or subtest) compares to the scores of other similar test takers." Panel's Decision, January 9, 2007, at 4. Such scores *do not* indicate the student's present instructional level or the specific knowledge a student possesses. Id.

On appeal, the District does not respond to this finding, or explain how Student's raw scores in the "99<sup>th</sup> percentile" or testing in the "very superior range" translate into Student's current educational levels. Perhaps Student's educational level of performance is *above* the 7<sup>th</sup> grade in some or all of those areas, or below. The GWR and the GIEP merely reiterated that Student's scores were in the "superior range", "very superior range" and "high average range" in various standardized tests.

The District concluded, without any explanation, that Student's "scores clearly indicate the Student's need for acceleration to seventh grade in all subject matter." District's Brief at 22. The District argues that Student's teachers and parents "overwhelmingly concluded that Student required acceleration beyond his current elementary curriculum." District's Brief at 23. However, in order to comply with the regulations and meet the needs of the student, a more in-depth, curriculum-specific analysis is required to establish the student's present educational levels for each academic subject.

For example, Student was not tested from the District's 7<sup>th</sup>, 8<sup>th</sup>, or 9<sup>th</sup> grade curriculum. Parents maintained this, and having "future teachers with familiarity with the subject areas" as part of the GIEP team, would have provided a clearer indication of where Student was academically. *See* Letter from Parents to

Dukeman, June 14, 2006, at 1; R.R. at 359a. Along these lines, Mr. Dukeman conceded on cross-examination that Student was more advanced than the 7<sup>th</sup> grade in reading, (he actually tested 80% at the 10<sup>th</sup> grade level) yet he was placed in 7<sup>th</sup> grade reading. N.T. 9/22/06 at 84. And, Mr. Dukeman conceded that no grade equivalents could be gleaned from the results of the other tests Student was given.

Mr. Dukeman opined that it would not be appropriate to test “in a subject that the child has no relation to, no exposure to.” N.T., 9/22/06 at 104; R.R. at 204a. But, he did not explain why. Ms. Edmunds, the psychologist who tested Student, testified she did not like to use grade equivalent scores because “they are often misinterpreted.” N.T., 9/22/06 at 184-185; R.R. at 224a.

These views ignore the critical point. Chapter 16 regulations *require* the District to establish academic instruction levels in all academic subject areas and begin the analysis by assessing Student’s “present levels of educational performance.” Mr. Dukeman’s or Ms. Edmund’s personal beliefs that curriculum-specific testing is not appropriate does not factor into the equation. If that was the case, then the District was obligated to adopt some other valid means of determining Student’s “present levels of educational performance.” The District has not explained how it complied with the Chapter 16 criterion. Nor does this Court believe the District’s witnesses provided an adequate explanation. While the District spends pages of its Brief defending its GWR, it fails utterly to explain the absence of present levels of educational performance in the GIEP or how those test results justify 7<sup>th</sup> grade placement.

One striking example is the District’s placement of Student in Algebra I, the annual goal being “to develop basic Algebra I skills” even though Student

scored in the 99<sup>th</sup> percentile in Algebra I. GIEP, 2006-2007, at 9; R.R. at 371a. Mr. Dukeman explained that Student was not *tested* in Algebra I. He was given a pre-diagnostic test, which did not deal with actual academic material but dealt with the prognosis of the child's success in Algebra I class. N.T., 9/22/06, at 104; R.R. at 204a. He was not placed in Algebra II or Calculus because those advanced math courses are not offered in the middle school. Algebra I was the highest math course offered in the middle school. N.T., 9/22/06 at 194; R.R. at 227a. Student's fifth grade math teacher knew that Student should be placed higher than sixth grade math but he did not know what grade he should be accelerated to. Ms. Mower admitted "we don't know everything he knows in math at this point." N.T., 9/22/06 at 315; R.R. at 110a.

The problem with the District's approach is that it *should* know what the Student knows in math. How can a district provide appropriate instruction at a student's present educational levels if it does not know what those levels are? If Student's present educational performance level in math is *beyond 7<sup>th</sup>* grade, then it does not meet his requirements to place him *in 7<sup>th</sup>* grade math with the annual goal of "developing basic skills." Yet, this is what happened here. At the least, the District could have had a middle school Algebra I teacher present during the GIEP meetings to consider Student's performance and determine if it would be *meaningful* for Student to attend Algebra I.

Clearly, the Team did not conduct a sufficient evaluation to determine academic instruction levels in all academic subject areas or include the requisite "present levels of educational performance" to establish a baseline for Student from which the District could monitor and track his progress and appropriately place him.

## 2. Other Flaws in the GIEP

The Panel pointed out other major flaws in the GIEP. For example, the Panel concluded that the GIEP's "Annual and Short-Term Goals" section failed to address science and social studies, two major areas of Student's strengths. Many of Student's other strengths, such as vocabulary knowledge and usage, music and reading, and interpreting schematic drawings were also not addressed.

As the Panel noted, the annual goals and short-term goals must coincide with the learning needs identified during the GWR. Chapter 16 requires that the GIEP must be responsive to the gifted student's needs. Failure to address one or more of those needs renders that GIEP inappropriate and denies a student a free and appropriate public education.

Because the District ignored many areas of Student's needs and strengths, this Court agrees with the Panel that the GIEP was incomplete and inadequate to support the District's proposed placement in 7<sup>th</sup> grade.

## **IV.** **Whether the District's Proposed 7<sup>th</sup> Grade Placement was Inappropriate**

The District contends, in spite of of the GIEP's flaws, the evidence clearly showed that *any* level of placement at the elementary school was questionable due to the Student's level of ability and the "virtual ease" by which the Student accomplished his fifth grade work and the "complete lack of challenge for Student in the elementary gifted curriculum." District's Brief at 24. The District notes that a school district may not be compelled to provide a Student with educational programs beyond its existing curricular offerings and claims the

Appeal Panels wants to “move the entire middle school to the elementary school for the Student in question.” District’s Brief at 26.

These arguments are misplaced. First and foremost, because the District’s placement was based on a flawed GIEP this Court is unable to concur with the District that its consequent 7<sup>th</sup> grade placement was appropriate.

Second, the District was not compelled to provide Student with instruction beyond the District’s general “enrichment” program. The program advocated by Parents and adopted by the Panel included Student’s enrollment in advanced mathematics and science *at the middle school* commensurate with Student’s present level of educational performance, and the balance of his instruction, including gifted support, acceleration and enrichment, within the elementary school. There was evidence that at least one other elementary gifted student took some classes in the middle school.

This is not a case where the school district was directed to provide a gifted student with an individualized program of instruction beyond the general enrichment program offered by the district, including private tutors and college-level courses. See Brownsville Area School District v. Student X.

Furthermore, the District ignores the social aspects that were weighed by the Panel. The District maintains that Student would benefit by being with his “cognitive peers.” Parents, on the other hand, believed Student would benefit from remaining with his “age peers” in subjects other than math and music, where there

is little need for student interaction and dialogue. As pointed out by Parents, the GIEP at issue in the second hearing was for the 2006-2007 school year.<sup>11</sup> The District's proposal entailed a jump from fifth grade (elementary) to seventh grade (middle school) without any participation in six grade transitional activities. Parents were particularly concerned that Student would miss the extra socialization and extra activities that sixth graders do to "honor" completion of elementary school and prepare for the transition to middle school. Parents expressed concern regarding Student's social adjustment and wanted Student to have a chance to allow "a kid to be a kid." N.T., 9/22/06, at 427-428; R.R. at 137a-138a. Student's mother believed that Student could meet the academic components, but it was not as clear to her that he could meet the social components. N.T. 9/22/06 at 428; R.R. at 138a. The Panel also considered Student's preference to remain a sixth grader. If he skipped sixth grade altogether, he would miss those subjects in social studies and science he wanted to learn. It was the Panel's prerogative to weigh the evidence and conclude that Parents' position was more persuasive.

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<sup>11</sup> As an aside, this Court notes that during the lapse of time between the Panel's decision and this Court's consideration, the 2006-2007 school year expired. Neither party has addressed whether the issues raised by the District are moot. Unless an actual case or controversy exists at all stages of the judicial process, a case will be dismissed as moot. Pennsylvania Liquor Control Board v. Dentici, 542 A.2d 229 (Pa. Cmwlth. 1988). The only time this Court will decide questions that have otherwise been rendered moot is when one or more of the following three exceptions to the mootness doctrine apply: 1) when the case involves questions of great public importance, or 2) when the conduct complained of is capable of repetition yet avoiding review, or 3) when a party to the controversy will suffer some detriment without the court's decision. County Council of the County of Erie v. County Executive of the County of Erie, 600 A.2d 257, 259 (Pa. Cmwlth. 1991) (*citing* Strax v. Department of Transportation, Bureau of Driver Licensing, 588 A.2d 87 (Pa. Cmwlth. 1991) and Cytemp Specialty Steel Division, Cyclops Corp. v. Pennsylvania Public Utility Commission, 563 A.2d 593 (Pa. Cmwlth. 1989)).

Here, in order to resolve the propriety of the Panel's compensatory education award, it is necessary for this Court to determine if, and when, the District provided Student with an appropriate FAPE. Because the issues raised by the District go directly to the appropriateness of the GIEP and FAPE, this Court has addressed them.

Accordingly, the District's global solution of full acceleration, while an obvious acknowledgment of Student's exceptional intelligence, did not necessarily, as the District urges, satisfy the recognized "needs" of Student.

## V.

### **Whether the Panel Erred in Ordering Compensatory Education**

Finally, the District asserts that the Panel erred when it awarded continuing compensatory education.

This Court has recognized that when a gifted child is denied a free appropriate public education, compensatory education may be an appropriate remedy for a district's failure to provide an adequate educational program for the gifted child. Brownsville Area School District, 729 A.2d at 200. Where there is a finding that a student is denied a free appropriate public education and the Panel determines that an award of compensatory education is appropriate, the student is entitled to an amount of compensatory education reasonably calculated to bring him to the position that he would have occupied but for the school district's failure to provide it. B.C., by and through his parent and natural guardian, J.C. v. Penn Manor School District, 906 A.2d 642 (Pa. Cmwlth. 2006).

The District notes that compensatory education is an equitable remedy. It challenges the Panel's imposition of compensatory education because it ignored Parents' "wildly" inconsistent positions (regarding acceleration) during the due process hearings. Specifically, the District notes that Student's mother sought global acceleration during the first hearing, in part, due to his maturity. According to the District, mother completely contradicted herself at the second hearing where she, at one point, indicated that she was concerned about his ability to deal with the

social component of acceleration. The District maintains that compensatory education was inappropriate because it “was simply following the desires of the Parents” when it recommended acceleration to 7<sup>th</sup> grade. District’s Brief at 30.

The District’s argument is rejected.

First, nowhere in Chapter 16 does it state that a District may meet its obligations to a gifted student if it does exactly what the parents request. If that were the case, there would be no need for the Team or a GIEP.

Moreover, Parents requested full grade acceleration from fifth grade to sixth grade, which was within the elementary school setting. Mother testified that Student was mature, however, at the second hearing she clarified that he was not mature enough, socially, to handle global acceleration from fifth to seventh grade, that is, from the elementary school to the middle school. Parents’ initial request for grade acceleration was also made at a time when they did not know where their child was academically because adequate testing had not been conducted by the District. Fortunately, Parents had the insight to know that Student required much more than what the District made available to him. The bottom line is that the District failed to properly evaluate and provide Student with an adequate GIEP.

As it has been established by substantial evidence of record that the District failed to provide Student with an appropriate educational placement, it was



not error for the Appeals Panel to award compensatory education. Saucon Valley School District v. Robert O., 785 A.2d 1069 (Pa. Cmwlth. 2001).<sup>12</sup>

Accordingly, the order of the Special Education Due Process Appeals Review Panel is affirmed.

BERNARD L. MCGINLEY, Judge

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<sup>12</sup> This Court has no way of knowing if the compensatory education awarded to Student has brought him to the position that he would have occupied but for the District's failure to provide a free appropriate public education. Based on the record before us, and because neither party challenges the actual substance of the award, this Court will affirm the Panel.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

North Penn School District,	:
Petitioner	:
	:
v.	:
	:
James D., and Adelle B.,	:
Parents and Natural Guardians of	:
D.D.,	: No. 278 C.D. 2007
Respondents	:

**ORDER**

AND NOW, this 10th day of September, 2007, the order of the Special Education Due Process Appeals Review Panel is hereby affirmed.

BERNARD L. MCGINLEY, Judge