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

**In Re:**

**THE EDUCATIONAL ASSIGNMENT OF : SPECIAL EDUCATION  
D.L., A STUDENT IN THE : OPINION  
DANIEL BOONE AREA SCHOOL DISTRICT : No. 1586**

**BEFORE APPEALS PANEL OFFICERS CAUTILLI, KAUFMAN & McELLIGOTT.  
OPINION BY McELLIGOTT.**

**BACKGROUND**

Student. is a middle school student in the Daniel Boone Area School District (“District”). The parties do not dispute the student’s eligibility under Pennsylvania gifted education law<sup>1</sup> as a gifted student. The District has proposed a gifted individualized education plan (“GIEP”) for the 2004-2005 school year. Parents object to the appropriateness of the District’s proposed GIEP and seek compensatory education for the 2004-2005 school year and prior school years.

For the purposes of this due process proceeding, events begin in April 2003 when the student’s GIEP team developed a GIEP for the student for the remainder of the 2002-2003 school year, a GIEP that would carry over into the 2003-2004 school year.<sup>2</sup> In November 2003, the GIEP team reconvened to revise the student’s GIEP.<sup>3</sup> By January

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<sup>1</sup> See generally 22 PA CODE §16.1, *et. seq.*

<sup>2</sup> School District Exhibit (“S”)-9. The District exhibits in the record are not clearly marked. This panel has, in its estimation, used the record constructed by the hearing officer and the content of exhibit to identify exhibits appropriately.

<sup>3</sup> S-7.

2004, the student's gifted support teacher concluded that the student had completed all of the projects outlined in the November 2003 GIEP.<sup>4</sup>

The student completed the 2003-2004 school year, the student's 7<sup>th</sup> grade year, with grades in all classes at or above 94%.<sup>5</sup> In August 2004, the student's father met with the District to discuss the student's 8<sup>th</sup> grade program for the upcoming 2004-2005 school year.<sup>6</sup> Thereafter, the student's teachers shared by email details of the honors programming that the student would be taking.<sup>7</sup>

In October 2004, the GIEP team met to reconsider the student's GIEP.<sup>8</sup> The parents were dissatisfied with the District's proposed GIEP and, unable to resolve the dispute, they filed for due process on October 7, 2004.<sup>9</sup>

The hearing took place over two sessions in January 2005. In a decision dated February 1, 2005, the hearing officer found that (1) both the District's GIEP for the 2003-2004 school year and the proposed GIEP for the 2004-2005 school year were inappropriate and (2) awarded compensatory education.<sup>10</sup> The District filed broad exceptions to the findings, reasoning, and order of the hearing officer.

The panel received the case materials on February 22, 2005.

## **DISCUSSION**

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<sup>4</sup> Notes of Testimony ("NT") at 78.

<sup>5</sup> See final grade reports in S-4. Also, in March 2004, the student scored at or above the 88<sup>th</sup> percentile on the Iowa Test of Basic Skills.

<sup>6</sup> NT at 323.

<sup>7</sup> Parents' Exhibit ("P")-1 at pages 3-9.

<sup>8</sup> S-3.

<sup>9</sup> P-1 at page 13.

<sup>10</sup> Parents had claimed compensatory education for the 2002-2003, 2003-2004, and 2004-2005 school years. The hearing officer limited the parents' claim to a period of one year before the parents filed for due process, adopting the limitations period established by Montour School Dist. v. S.T., Pa. Commonwlth., 805 A.2d 163 (2002). The order, then, calculated compensatory education forward from October 7, 2003.

This panel’s standard of review requires an independent examination of the record in addition to a determination of whether any error of law has been committed. The panel must defer to the hearing officer’s determinations on issues of credibility “unless 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.”<sup>11</sup> As set forth below, the panel will deny the District’s exceptions and affirm the hearing officer’s decision in substance, although we will slightly modify the order in terms of the amount of compensatory education awarded.

#### Appropriateness of the District’s GIEPs

In reviewing the hearing officer’s decision on the GIEPs, we agree with the hearing officer that the District proposed inappropriate GIEPs for the 2003-2004 and 2004-2005 school years. Specifically, we agree that the re-evaluation process is, at best, stale and in need of updating, if not procedurally flawed in programming on an evaluation that is four years old.<sup>12</sup> Additionally, the GIEPs are fatally flawed by lacking adequate present levels of education performance, annual goals and short term objectives, specially designed instruction, assessments, or timelines for gauging student achievement.<sup>13</sup> In short, the GIEPs for both school years, 2003-2004 and 2004-2005, are inappropriate and amount to a denial of a free appropriate public education (“FAPE”) under the terms of Pennsylvania’s gifted education regulations.

Accordingly, we will affirm the hearing officer’s decision with regard to the inappropriateness of the GIEPs and the subsequent denial of FAPE.

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<sup>11</sup> Carlisle Area School Dist. v. Scott P., 62 F.3d 520 (3d Cir. 1995), cert denied, 517 U.S. 1135 (1996).

### Compensatory Education

Compensatory education is a remedy for a denial of FAPE for a gifted education program.<sup>14</sup> As such, we have no difficulty with the hearing officer's decision to award compensatory education. We do, however, find that the record as a whole compels us to modify the amount of that award. And one particular aspect of the hearing officer's order will be modified as it appears to overreach the bounds of such an award.

First, we agree with the District that the hearing did not address head-on the issue of the student's giftedness in music, and so the record is devoid of evidence on that issue. What evidence was presented amounted to the student's testimony as to interest and seeming ability, but no testimony or exhibit was offered in the context of the student's identified giftedness or formal programming.<sup>15</sup> The hearing officer identified the student's self-described music endeavors as "talent" that qualified the student for giftedness in that area,<sup>16</sup> but the record as a whole is not strong enough, in any particular or in its entirety, to make such a leap. Therefore, we will eliminate any award of compensatory education based on music.

Second, we further agree with the District that the hearing officer erred in basing the calculation of compensatory education on the student's entire instructional day. While

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<sup>12</sup> 22 PA Code at §16.23.

<sup>13</sup> Id. at §16.32(e).

<sup>14</sup> Centennial School Dist. v. Dept. of Educ., 517 Pa. 540, 539 A.2d 785 (1988); Brownsville Area Sch. Dist. v. Student X., Pa. Commonwlth. , 729 A.2d 198 (1999); Pennsylvania Special Education Opinion 1270.

<sup>15</sup> See NT at pages 236-240.

<sup>16</sup> We surmise that the hearing officer sees the student's musical ability as "creative ability" that qualifies the student as "mentally gifted" under 22 PA Code §16.1.

we see clear needs to award compensatory education, we agree with the District that, in its words, “compensatory education for such classes as Spanish, family and consumer science, computers, etc., cannot be awarded without knowing that (the student) is, in fact, gifted in those areas.”<sup>17</sup> Therefore we will adjust the calculation of the amount of compensatory education.<sup>18</sup>

Third, one aspect of the hearing officer’s order is overly broad. The order seems to imply that programming accessed as part of the compensatory education award is at the sole discretion of the student and parents. As noted earlier, gifted education—whether the GIEP or as part of a compensatory education award—need not lie outside of the District’s curriculum. A District may choose to make gifted programming available outside of its curricular offerings but need not do so as a matter of law.<sup>19</sup>

Accordingly, we will modify the hearing officer’s decision with regard to the award of compensatory education and to one specific aspect of the hearing officer’s order.

Finally, the hearing officer points out in the decision, though not as part of the order, that the District would be wise to re-evaluate this student. We heartily agree. As pointed out above, the delay in re-evaluating may in itself be a denial of FAPE; at the very least it is poor practice to go four years without a re-evaluation, especially in the

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<sup>17</sup> District’s Exceptions to Hearing Officer’s Decision at page 10.

<sup>18</sup> The hearing officer, in his order, has set forth the means to calculate the compensatory education award but has not arrived at an explicit number of hours. Thus, we find it difficult to adjust the amount of compensatory education. As such, we will use the hearing officer’s calculation and reduce the award in a way that is equitable based on the District’s exceptions and the record as we construe it in its entirety.

<sup>19</sup> See, infra, Centennial and Brownsville.

pivotal developmental years represented in middle school. A global re-evaluation seems to be in order.

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### **ORDER**

And now, this 23<sup>rd</sup> day of March 2005, the decision and order of the hearing officer in this matter are AFFIRMED with the following modifications:

- The compensatory education award shall exclude any time based on music education or music programming;
- A compensatory education calculation shall be performed under the terms of the hearing officer's order and decision (see page 11 of the hearing officer's decision) for the 2003-2004 and 2004-2005 school years;
- The compensatory education award shall be one-half of the amount of hours as calculated in the previous paragraph; and
- Paragraph 2(c) of the hearing officer's order shall read as follows:

The District and the parents are to reconvene the GIEP team and develop a list of the curricular offerings in the District which will allow (the student) to progress at a rate commensurate with (the student's) ability. The offerings may involve independent study during the school year or over the summer months by agreement of the GIEP team or with the explicit approval of the District. The entitlement to compensatory education expires when (the student) graduates from the District High School or reaches the age of 21.

Any exceptions not specifically addressed by this order are dismissed. Pursuant to 22 PA. CODE 16.63(l), the parties are advised that this matter may be appealed to the Commonwealth Court of Pennsylvania or to the appropriate federal District Court.

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Michael J. McElligott  
for the Appeals Panel

Signed: March 23, 2005

Mailed: March 24, 2005