

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

D. C. and S. C., in their own right and	:	
as Parents and Natural Guardians of	:	
K. C., a minor,	:	
Petitioners	:	
	:	
v.	:	No. 285 C.D. 2010
	:	Submitted: October 12, 2010
Kennett Consolidated School District,	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY

FILED: March 24, 2011

Petitioners D. C. and S. C. (Parents), the parents of K. C. (Student), petition for review of an order of a Special Education Hearing Officer which concluded that Respondent Kennett Consolidated School District (District) did not fail to offer Student an appropriate gifted education, and that Student was therefore not entitled to compensatory education.¹ We affirm.

¹ Additionally, the Hearing Officer ordered a reconvening of Student’s Gifted Individualized Education Plan team, including Parents, for further development and revision of Student’s GIEP.

At the time of the Hearing Officer's review of the instant matter, Student was enrolled in 7th grade in the District, and was undisputedly eligible for gifted educational programming pursuant to Chapter 16 of Title 22 of the Pennsylvania Code, 22 Pa. Code §§16.1-16.65. Throughout Student's attendance within the District, she received various enriched and/or accelerated course work. Parents have been involved in the particulars of Student's education, and have participated in all Gifted Individualized Education Plan (GIEP) meetings. Following a protracted period of negotiation between Parents and the District over the exact terms and implementation of Student's current education plan, Parents requested a due process hearing based upon their assertion that Student has not been offered an appropriate gifted education since January 2003.² Proceedings commenced before the Hearing Officer at which both parties were present and represented by counsel. The Hearing Officer found the following relevant facts.

To varying degrees and in varying subjects, since at least 5th grade Student has received the following enrichment services from the District: accelerated/advanced curricula, one-on-one instruction, Academically Talented (AT) course work (including individualized work and self-selected study topics), and differentiated instruction (with leadership opportunities, and additional support and participation opportunities based on Student's academic strengths). Some of those enrichments were discontinued at Parents' request. Additionally, Student has

² Parents' Due Process Complaint Notice is less than precise regarding what academic year(s) are being challenged. In his opening statement to the Hearing Officer, Parents' counsel specified two issues: District's denial of an appropriate education since May 2008, and whether

(Continued....)

chosen to not participate in some enrichments that were offered. Parents testified that they did not contact any individual teachers about any concerns throughout the 2008-2009 school year, did not go into the school or observe any direct instruction, and made no requests for acceleration beyond what the District was already providing. Student underwent a Gifted Re-evaluation in August 2009 in which she scored in the highest percentiles in standardized intelligence and achievement tests, and scored in the average range for emotional and social assessments.

Parents requested, and were granted, additional curricula acceleration for the 2009-2010 school year. Student's teachers thereafter performed progress assessments, and observed no behaviors demonstrating boredom or disengagement. Following one teacher's assessment, Student was assigned leadership positions targeted at her then-existing GIEP goals. The teacher charged with updating Student's GIEP has a good relationship with her, conducted in-depth interviews therewith prior to revising Student's GIEP, and noted that Student had made no mention that she was dissatisfied with any course (aside from requesting to take one course as independent study to enable her to attend a music class). In relation to Student's 2009-2010 school year, one or both Parents participated in all GIEP meetings, approved all Notices of Recommended Assignment (NORA), and were very involved with Student's educational program.

In determining the parties' and witnesses' credibility, the Hearing Officer found Student's mother's testimony unpersuasive in regards to Student's

the District's proposed program and placement is appropriate for the 2009-2010 school year.

day-to-day classes, in that this testimony was based entirely on Student's own reports. The Hearing Officer also did not rely upon the testimony of the Director of Special Education, on the basis that she, like Parents, had not observed Student's classes. The Hearing Officer expressly relied upon the testimony of Student's teachers as persuasive and convincing evidence to address the appropriateness of Student's Gifted Education program. Student's teachers were found to be credible, and to have demonstrated knowledge of Student, her strengths, the teachers' awareness of Student's needs for enrichment and acceleration, and the detail of how the teachers are providing for her gifted instruction.

The Hearing Officer noted and rejected Parents' arguments that Student was placed within some advanced or accelerated classes in groups with peers who were not classified as gifted. The Hearing Officer acknowledged that Pennsylvania regulations do not guarantee gifted students any such restricted peer placement, and that such grouping would obstruct a student's right to associate with average regular peers. The Hearing Officer noted and rejected Parents' argument that Student's GIEP improperly contained language found in other gifted students' GIEPs. The Hearing Officer concluded that Parents failed to establish that Student's GIEP goals (namely, regarding higher order thinking skills, research project development, and leadership skill development) were not appropriate, given Student's assessments and achievements, and the opportunities made available.

The Hearing Officer acknowledged that Student meets the qualifying standards for receiving gifted services under the relevant Pennsylvania regulations, and that Student does very well academically across the board, with a truly gifted area identified as mathematics. The Hearing Officer concluded that the District has nurtured Student's mathematics gifts in concert with Parents since at least 5th grade, through the present. The Hearing Officer agreed with Parents that Student's GIEP contains some correctable flaws, but concluded that Student was not in any respect denied an appropriate gifted education, in that she has clearly made meaningful educational progress and has been provided with numerous opportunities to make full use of her intellectual abilities. As such, the Hearing Officer concluded that Student was not entitled to compensatory education.

The Hearing Officer concluded that Parents had not met their burden of establishing an evidentiary basis for the GIEP team's failure to produce, with Parents' input, a GIEP that resulted in any inability on Student's part to make meaningful educational progress. Nonetheless, the Hearing Officer also emphasized that Student's GIEP must be revised to describe in more specific detail how each of Student's goals is being currently addressed through the enrichment and acceleration that Student is currently receiving.

By Order and Decision dated February 1, 2010, the Hearing Officer concluded that the District did not fail to offer Student an appropriate gifted education, and that Student was not entitled to compensatory education. Further, the Hearing Officer ordered that the District shall reconvene the GIEP team, including Student and Parent, to list Student's present levels of need for developing

higher thinking skills, for developing research and leadership skills, and to then use objective and measurable terms in describing goals and delineating progress towards those goals for Student in each area of need. Parents now appeal from the Hearing Officer's order to this Court.³

This Court's scope of review 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. Bethlehem Area School District v. Zhou, 976 A.2d 1284 (Pa. Cmwlth. 2009).

We first address Parents' assertion that the Hearing Officer erred in concluding that the District offered Student an appropriate gifted education. Parents argue that the Hearing Officer erred in concluding that Parents did not prove the inappropriateness of District's efforts, asserting that it is the District, and not Parents, that is tasked with preparing an appropriate program and placement for

³ This Court has jurisdiction over the instant action pursuant to Section 763(a)(1) of the Judicial Code, 42 Pa.C.S. §763(a)(1). Pursuant to Section 16.63 of Title 22 of the Pennsylvania Code, 22 Pa. Code §16.63, an impartial due process hearing concerning the identification, evaluation or educational placement of a gifted student is to be held before a hearing officer. An appeal therefrom is to be taken to a "court of competent jurisdiction," pursuant to Section 16.63(l), 22 Pa. Code §16.63(l). Section 16.63(m)(1) of Title 22 of the Pennsylvania Code notes that the authority for coordinating the services and arrangements of hearing officers in gifted due process hearings, including the compensation thereof, resides with the Secretary of the Department. 22 Pa. Code §16.63(m)(1). Given the Secretary's authority to delegate certain powers to a presiding officer in formal administrative proceedings, 1 Pa. Code §35.187, and the Secretary's authority, control, and action throughout the Commonwealth over the services, arrangements, and payment of hearing officers, with respect to gifted education due process, this Court exercises appellate jurisdiction over a final hearing officer order pursuant to Section 763(a)(1) of the Judicial Code, 42 Pa.C.S. §763(a)(1). See also Centennial School District v. Department of Education, 503 A.2d 1090 (Pa. Cmwlth. 1986), affirmed, 517 Pa. 540, 539 A.2d 785 (1988).

gifted children under Chapter 16 of the Pennsylvania Code which governs special education for gifted students.

Parents are correct in that Chapter 16 of Title 22 of the Pennsylvania Code requires a school district to provide gifted education to qualified students in which the student's GIEP is tailored to the child's unique needs. York Suburban School District v. S.P., 872 A.2d 1285 (Pa. Cmwlth. 2005). However, Chapter 16 is silent as to which party bears the burden of persuasion, or as to the burden(s) of production, in gifted education due process proceedings. We have, however addressed this issue in the past. In E.N. v. M. School District, 928 A.2d 453, 466-467 (Pa. Cmwlth. 2007), petition for allowance of appeal denied, 596 Pa. 748, 946 A.2d 689 (2008), we addressed parties' burdens in Chapter 16 proceedings in the context of establishing giftedness:

Parents also argue that the Panel did not conduct an appropriate review because it placed the burden of proof on Parents to establish that E.N. required specially designed programs or support services. Parents and the District acknowledge that the issue of burden of proof has never been decided in gifted cases.

* * *

Given the silence of Chapter 16 [of Title 22 of the Pennsylvania Code] as to burden, District contends that general administrative law principles would apply, and would place the burden on the moving party. District also argues that the burdens of Chapter 14 were themselves modified by the United States Supreme Court in Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528 (2005), in which the Supreme Court noted that, as to IDEA proceedings, in the absence of statutory guidance, administrative proceedings should follow general administrative law principles. We note that, in the

Schaffer case, the Supreme Court specifically limited its analysis to the burden of persuasion, which it characterizes as “which party loses if the evidence is closely balanced,” and did not address the burden of production, which it characterizes as “which party bears the obligation to come forward with the evidence at different points in the proceeding.” 126 S.Ct. at 533-34.

From our own review, we find that our appellate courts have not specifically identified who bears the burden in gifted proceedings and Chapter 16 is, itself, silent. Given the silence of Chapter 16 [on the parties’ respective burdens], general administrative law procedures would apply and would place the initial burden on the moving party. See generally, Mars Area School District v. Laurie L., 827 A.2d 1249, 1255 (Pa. Cmwlth. 2003) (an IDEA case in which we noted that “because [student’s] mother was the party appealing the School District’s decision to discontinue [student’s] special education and she requested the due process hearing before the hearing officer, she had the burden of proving that [student] was entitled to continued special education.”). However, once the initial burden is met, the matter is left for the finder of fact to weigh the evidence presented by both sides and decide the case on the weight of the evidence. Haygood v. Civil Service Commission, 576 A.2d 1184, 1185 (Pa. Cmwlth. 1990). While a fact finder may not ignore overwhelming evidence in favor of a result that is not supported by the evidence, the weight to give to particular items of evidence is within the discretion of the fact finder. Peak v. Unemployment Compensation Board of Review, 509 Pa. 267, 272, 501 A.2d 1383, 1386 (1985).

From our review, it seems clear that Parents met their initial burden. **Meeting that initial burden is not determinative of the case; however, and in this case, the Panel appropriately relied on the record developed by the Officer to weigh the conflicting evidence, ultimately concluding that the District’s case was stronger. As there is substantial evidence to support that decision, we find no error in it.**

(Emphasis added).

In the matter *sub judice*, there is no dispute that Student is entitled to a gifted education. Rather, Parents' complaint centers solely around their assertion that the District has failed to provide Student with an appropriate gifted education. Given that basis for Parents' complaint, we conclude that Parents' did properly proceed under the initial burden to show the fact finder that the District had so failed. As such, the Hearing Officer did not err in assigning an initial burden to Parents herein. Accord D.Z. v. Bethlehem Area School District, 2 A.3d 712 (Pa. Cmwlth. 2010) (Parent challenging appropriateness of gifted and special education for her son assigned initial burden of proving the allegations in her complaint, in proceedings before a hearing officer). Thusly, the Hearing Officer did not err in relation to Parents' burden. E.N. v. M. School District.⁴

We next note that Parents' burden in this matter is solely in relation to Student's specific GIEP, and the educational programming thereunder. Parents' multiple arguments citing to GIEPs of other students that Parents assert have been rejected in unrelated cases are of no moment to Parents' burden hereunder, and are of no moment to the appropriateness of Student's GIEP. Gifted education is, at its core, an individually tailored process in which the "[g]ifted education for each gifted student ... is based on the unique needs of the student, [and] not solely on the student's classification." Section 16.2(d)(2) of Title 22 of the Pennsylvania

⁴ We emphasize that notwithstanding the precise language employed by the Hearing Officer in relation to the parties' burdens, her Decision as a whole and the record developed in the proceedings clearly demonstrate that the Hearing Officer fully weighed and considered the

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Code, 22 Pa. Code §16.2(d)(2). Parents in this matter do inherently recognize this axiomatic principle in their arguments to this Court focusing on the individual needs of Student, and center many of their arguments on the very fact that, in their view, the instruction being provided to Student is not individualized enough. As such, Parents' arguments citing to other students' alleged similar GIEPs which have been struck down in other actions are irrelevant to the specific facts and disposition of this case. Most generally stated, a district violates Chapter 16 when it fails to implement an adequate *individualized* plan for a gifted student. York Suburban School District. A district's Chapter 16 obligation to individualize is not without limits, and need not maximize a student's ability to benefit from an individualized program. Centennial School District.

Citing to York Suburban School District, *inter alia*, Parents next argue that the District failed to tailor Student's gifted education to her strengths and weaknesses, that the GIEP offers only mere placement in the same honors courses available to all high achievers in her grade, and that the GIEP's description of Student's goals merely restates the regular curricula offered to all students. The record herein, as found credible and weighed by the Hearing Officer, demonstrates otherwise.

We note that Parents have failed to challenge any of the Hearing Officer's Findings of Fact in this matter. As such, those Findings are conclusive on appeal. See generally, E.N. v. M. School District. Those conclusive Findings,

conflicting evidence in this matter, and decided this case on the weight of that evidence.

as made by the Hearing Officer and supported by substantial evidence⁵ of record, support the conclusion that Student received a program of instruction that met her need for enrichment through a combination of acceleration, placement in advanced level courses, independent study, and differentiated instruction. The Hearing Officer found that Student's courses, over the prior two academic years, were: accelerated in math, German, and 8th grade English (Hearing Officer Decision, Findings of Fact (hereinafter, "Finding") 4, 21-24, 28, 32); enriched by placement in AT level courses in English in 6th grade, social studies in 6th, and science in 7th (Findings 5, 7, 25-26, 28); comprised of independent study in 7th grade English (Finding 31), and; differentiated in science in 6th grade (Finding 10).

A gifted education is inappropriate when a district offers only grade level books and fails to tailor class work to the student's individual needs. York Suburban School District. Given the Findings cited above, Parents' arguments regarding the District's failure to accelerate or otherwise differentiate Student's instruction, or to tailor class work to Student's needs, are without merit. Id.

The remainder of Parents' arguments on this issue consists of Parents' citation to their preferred evidence of record that contradicts the Findings of Fact as made by the Hearing Officer on the subjects of Student's boredom and lack of challenge, the ease of the work completed by Student, and Student's own complaints about her subject material and instruction. All of these assertions are

⁵ Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; it exists upon appellate review when, upon examination of the record as a whole, the evidence, including the inferences therefrom, are found to be such that a

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contradicted by the Findings of Fact as made by the Hearing Officer. See Findings 6, 9, 11-14, 18, 26-27, 30. Parents’ arguments on these issues are essentially a request for this Court to reweigh the evidence presented in Parents’ favor. Such a request is beyond this Court’s scope of review, in light of the Hearing Officer’s exclusive province over the finding of facts, over the weight to be assigned to the evidence, and over credibility determinations. Bethlehem Area School District v. Zhou; E.N. v. M. School District.

Finally on this issue, Parents assert that the Hearing Officer wrongly faulted Student, and Parents, for not pursuing academic endeavors at home. Parents emphasize that they are not trained educators, and argue that Chapter 16 does not permit the District to escape its gifted educational obligations by “blaming Parents for not doing the District’s job after school hours.” We agree with the District’s characterization to this Court that Parents apparently misinterpret, and mischaracterize, the Hearing Officer’s Decision as a personal rebuke. To the contrary, the Hearing Officer compliments and encourages Student to have interests beyond purely academic pursuit. See Decision at 8-11. Beyond those complimentary mentions, the Hearing Officer’s Decision is bereft of any indication that this issue impacted the Hearing Officer’s disposition to any degree. Id.

reasonable man might have reached this decision. E.N. v. M. School District.

Accordingly, in light of the foregoing Findings and concomitant Conclusions, the Hearing Officer did not err in determining that Student received an appropriate gifted education.

We next address Parents' general arguments, throughout their brief to this Court, that the District has failed to provide and/or develop appropriate annual goals for Student, and that the District has not tailored Student's education to her strengths and weaknesses. In light of our foregoing analysis, we emphasize that the Hearing Officer candidly and properly addressed these assertions by Parents, and ordered an appropriate remedy therefor notwithstanding the District's provision of an appropriate gifted education to Student. The Hearing Officer wrote:

Parents are indeed correct that there are flaws in the GIEP's themselves as written that cannot be ignored, and certainly recording of accurate present levels, specific student-centered objectives toward meeting the goals, and more carefully spelled out specially designed instruction is necessary, as is careful editing.

* * *

[W]hat is required in the instant case, and what will be ordered, is for the GIEP team to re-convene to develop objective, measurable goals for each of the three areas of gifted educational need, first listing as far as is practicable[] Student's present levels of need in objective and measurable terms, and then using those same objective and measurable terms when developing goals for Student in each area of need.

Decision at 10-11. Given Student's receipt of an appropriate gifted education in this matter, the Hearing Officer's order sufficiently addresses the issues raised by

Parents' in their argument on this point. The Hearing Officer's conclusion that the District provided an appropriate gifted education, for the reason set forth herein, renders Parents' arguments unpersuasive; the Hearing Officer's order provides a supplemental remedy to their arguments on this issue where none was required given the disposition.

Finally, we address Parents' request that this Court should order an award of compensatory education to remedy the District's purported failure to provide an appropriate gifted education. Given Student's receipt of an appropriate gifted education pursuant to Chapter 16 of Title 22 of the Pennsylvania Code, we discern no error in the Hearing Officer's failure to award compensatory education in this matter. Accord *Brownsville Area School District v. Student X*, 729 A.2d 198 (Pa. Cmwlth.), petition for allowance of appeal denied, 560 Pa. 731, 745 A.2d 1225(1999) (The purpose of compensatory education is to fairly compensate the student whose district has failed to provide the student a free appropriate public education).

Accordingly, we affirm.

JAMES R. KELLEY, Senior Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

D. C. and S. C., in their own right and :
as Parents and Natural Guardians of :
K. C., a minor, :
 Petitioners :
 : :
 v. : No. 285 C.D. 2010
 : :
Kennett Consolidated School District, :
 Respondent :

ORDER

AND NOW, this 24th day of March, 2011, the order of the Special Education Hearing Officer dated February 1, 2010, at ODR# 10067/08-09 AS, is affirmed.

JAMES R. KELLEY, Senior Judge