IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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| C.N., by her parents and natural guardians, J.H.N. and C.N., Petitioners | : | |
| v. | : | No. 280 C.D. 2010 |
| | : | Submitted: July 9, 2010 |
| Neshannock Township School District, Respondent | : | |

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE LEAVITT FILED: September 30, 2010

C.N., by her parents and natural guardians, J.H.N. and C.N. (Parents), petitions for review of an adjudication of a Special Education Hearing Officer (hearing officer) awarding C.N., a gifted child, 108 hours of compensatory education, using programs offered by the Neshannock Township School District (School District). Parents challenge the award because it did not grant a correct number of compensatory hours and limited the compensatory education to offerings of the School District. Discerning no error in the award, we affirm.

The facts in this case, as found by the hearing officer, are not in dispute. In November 2008, C.N., a student in the School District, was identified as gifted when testing revealed her to have an intelligence quotient of 136. At the time, C.N.

was six years old and enrolled in the first grade. A gifted individualized education plan (GIEP) was drafted in December 2008, as required by law.[1] The parties agreed that this GIEP did not meet the requirements set forth in Chapter 16 of Title 22 of the Pennsylvania Code.[2] The GIEP did not list any actual goals but simply listed classes, *i.e.*, "Basics of Spanish," "Mathematics," "Literature Review," and "Technology and other assignments throughout the year." Reproduced Record at 89a-92a (R.R. __). The GIEP also failed to provide for any individualized instruction or for any timelines.

Although the School District acknowledged the GIEP was a flawed document, it argued that it was of no moment because C.N. received an appropriate gifted education. Although the GIEP did not provide for individualized instruction, C.N. received it. Beginning in January 2009, C.N. met with a gifted education teacher once a week for 1.5 to 2 hours.

In February 2009, Parents requested C.N. to be moved into the second grade, and this was done. C.N. remained in second grade from February 2009, while also having weekly sessions with the gifted education teacher. C.N. also received individualized assignments from her second grade teacher.

C.N. entered the third grade in fall of 2009 and met with the gifted education teacher three times a week for thirty-five minute sessions. Her third grade teacher provided her advanced reading materials, *i.e.,* books intended for a sixth

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[1] A student with an intelligence quotient (IQ) of 130 or higher or a student with other education criteria that indicates gifted ability is to be provided an individualized gifted education by a school district. 22 Pa. Code §16.21(d).

[2] A GIEP is required to list short-term goals, annual goals and "[a] statement of the specially designed instruction and support services to be provided to the student." 22 Pa. Code §16.32(d)(3). Also, the GIEP is to include assessment procedures and timelines for determining whether the goals are being met. 22 Pa. Code §16.32(d)(5).

grade reading level, but he did not provide enrichment instruction in other areas because he did not believe C.N. was ready. Her gifted education teacher explained that because C.N. had completed two school grades in one year, she had knowledge gaps in areas such as mathematics and cursive writing. In October 2009, a meeting was held, and C.N.'s GIEP was revised. The revised GIEP outlined specific goals for C.N. in several of her classes. It also provided her the opportunity to perform science experiments; to take part in academic games with other school districts; and to research special interests.

Parents filed a due process complaint notice on December 8, 2009, alleging that the gifted education provided by the School District was insufficient and requesting compensatory education. In January 2010, Parents enrolled C.N. in private school, where she remains.

Following the hearing, the hearing officer made several findings. He found that C.N. had made significant educational progress. She successfully completed two grade levels in one year and was making excellent progress in the third grade. He found that C.N.'s move to the second grade would not have proceeded more quickly had an appropriate GIEP been in place. However, he found deficiencies in C.N.'s gifted education instruction. He believed it was C.N's own efforts, not the gifted instruction program, that enabled her to be accelerated to second grade. The hearing officer also found that C.N.'s move to second grade would have been improved by more guidance from the School District. Further, had her instruction been individualized, C.N. might have been selectively accelerated in certain subjects, such as mathematics, in which she excelled, instead of just being moved into the next grade.

The hearing officer concluded that the School District failed to provide C.N. gifted education appropriate for her academic and intellectual abilities. He determined that three hours of instruction weekly for the course of one school year would place C.N. into the position she would have been in, but for the School District's failure.[3] Accordingly, the hearing officer awarded C.N. 108 hours of compensatory education. The award provided that the compensatory education be undertaken within the School District's existing programming, curriculum or other academic/extra-curricular offerings. However, the actual educational enrichment chosen would be under the control of Parents and could be done after school or during the summer.

Parents have now appealed to this Court.[4] Their appeal is twofold. First, they claim that the hearing officer erred by requiring that C.N.'s compensatory education be completed by using the School District's offerings. Second, they argue that the hearing officer erred by not calculating the compensatory award on an hour-for-hour basis.

We begin with Parents' first issue, *i.e.*, that it was error to limit the award to gifted programs offered by the School District. Parents argue that Chapter 16 authorizes a School District to provide gifted education to a student directly but does not require the School District to do so. The School District may use other agencies. Accordingly, Parents assert that they should determine which institution should provide the compensatory education awarded to C.N. The School District

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[3] One school year was deemed to be 36 weeks in length.

[4] Our 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 of record. *Lower Merion School District v. Doe,* 878 A.2d 925, 927 n.4 (Pa. Cmwlth. 2005) (citing Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704).

counters that because C.N. is no longer enrolled in the School District, it will allow C.N. to use her compensatory education hours outside the School District. However, it is not willing to give Parents a blank check. The School District can provide gifted educational services at the rate of $31 per hour, and if Parents prefer more costly programs, the District will contribute $31 per hour to the cost of using other offerings. Parents dispute the School District's authority to limit the award in this way. They also complain that the School District is raising issues discussed in settlement that are not part of the record.

Parents' argument proceeds from a misunderstanding of Chapter 16. It states that "[e]ach school district shall, by direct service *or* through arrangement with other agencies, provide" gifted services. 22 Pa. Code §16.2(d)(1) (emphasis added). This does not mean, as Parents suggest, that a parent gets to select the program of its choice and require the school district to pay.

Compensatory education is an appropriate remedy and "limited to education available within the curriculum of the school district." *Brownsville Area School District v. Student X*, 729 A.2d 198, 200 (Pa. Cmwlth. 1999). As the Supreme Court has explained:

> The rule which we … endorse … is that a school district may not be required to become a Harvard or a Princeton to all who have IQ's over 130. We agree that "gifted" students are entitled to special programs as a group to bring their talents to as complete a fruition as our facilities allow. We do not, however, construe the legislation authorizing individual tutors or exclusive individual programs outside or beyond the district's existing, regular and special education curricular offerings.

*Centennial School District v. Department of Education*, 517 Pa. 540, 552-53, 539 A.2d 785, 791 (1988). In *New Brighton Area School District v. Matthew Z.*, 697

A.2d 1056, 1058 (Pa. Cmwlth. 1997), we held that gifted students were not eligible for tuition reimbursement or transportation to private schools or colleges "unless specifically agreed to by the public school district which the student attends."

In sum, Parents are free to negotiate with the School District as to how the awarded hours are to be used, but absent such an agreement, the School District is not obligated to pay for programs outside of its existing offerings. The hearing officer did not err in directing that C.N.'s compensatory education be provided within the School District's offerings.

Parents next claim that the hearing officer erred by not calculating the compensatory education award on an hour-for-hour basis. They concede that the hearing officer calculated the award in accordance with the standard established by this Court in *B.C. ex rel. J.C. v. Penn Manor School District*, 906 A.2d 642 (Pa. Cmwlth. 2006) (*Penn Manor*). However, they request that we revisit and reconsider our holding in that case.

In *Penn Manor*, a hearing officer determined that a gifted student had been given a deficient GIEP for the 2003-04 school year and awarded the student one hour of compensatory education for every school day of that year. The hearing officer next determined that the student's GIEP for the 2004-05 school year had also been deficient in some areas, but adequate in almost every subject area. The hearing officer also found the student received an appropriate education for the 2004-05 school year. Accordingly, the hearing officer ordered simply that the GIEP be revised to include certain necessary information for the 2004-05 school year. The student challenged the award of only one hour per day for the 2003-04 school year and the lack of any award for the 2004-05 school year.

In the appeal, we observed that a standard for determining the amount of compensation to be awarded to a student had not been determined under Pennsylvania law. However, three federal circuits had addressed the issue, with differing results.[5]

In *M.C. on Behalf of J.C. v. Central Regional School District*, 81 F.3d 389 (3d Cir. 1996), the United States Court of Appeals for the Third Circuit concluded that compensatory education awards should be equal to the period of deprivation, resulting in an award of compensatory education based on an hour-for-hour calculation.[6] This case was contrasted with *Parents of Student W. v. Puyallup School District, No. 3*, 31 F.3d 1489 (9th Cir. 1994), and *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516 (D.C. Cir. 2005), wherein the courts rejected a formulistic calculation of compensatory education awards, noting that the awards were equitable in nature and should be flexible. In *Parents of Student W.* and *Reid*, it was determined that an award should be based on the individual needs of each child.

This Court held that a flexible standard was more appropriate as it "tailors the equitable award of compensatory education to the particular student's needs, which a one-for-one standard fails to do." *Penn Manor*, 906 A.2d at 650. We noted that there may be cases in which the award would require more time than an hour-for-hour standard would provide, while in other cases, a student might need little or no compensatory education, having progressed appropriately despite having been denied an individualized education plan. *Id.* at 651.

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[5] These cases all involved children receiving special education for learning disabilities.

[6] The Third Circuit's formula was not unyielding. It qualified that while the award was to equal the period of deprivation it excluded "the time reasonably required for the school district to rectify the problem." *M.C.*, 81 F.3d at 397.

Parents argue that it is difficult and costly for a student to prove how many hours of compensatory education should be awarded. A school district has professional staff at its disposal, but parents must hire experts and an attorney, placing them at a distinct disadvantage. Parents suggest that this Court blend the formulistic and the equitable approaches. Under their proposed "blended" approach a student would be entitled to receive, at the very least, an hour-for-hour award equal to the period of deprivation. Further, if a student can establish that such an award should be increased, the hearing officer could expand the award.[7]

We decline to adopt Parents' blended standard. Parents' legal costs are no greater than that of any claimant, and a school district's funding is not unlimited. We rejected the "cookie-cutter" formulistic approach in *Penn Manor*, 906 A.2d at 650 (internal quotations omitted), because the "essence of equity jurisdiction is to do equity and to mould each decree to the necessities of the particular case." We stand by the holding in *Penn Manor*.

For these reasons, we affirm the decision of the hearing officer.

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MARY HANNAH LEAVITT, Judge

[7] The School District states that *Penn Manor* should not be reversed, but it does not provide argument on the issue.

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**O R D E R**

AND NOW, this 30th day of September, 2010, the order of the Special Education Hearing Officer, dated January 27, 2010, in the above-captioned matter is hereby AFFIRMED.

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MARY HANNAH LEAVITT, Judge