



No. 17069

The University of the State of New York

The State Education Department

Before the Commissioner

Appeal of G.G.C., by her parents,
from action of the New York City
Department of Education regarding
educational placement.

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Petitioners appeal the determination of the New York
City Department of Education ("respondent") regarding
G.G.C.'s placement in a citywide gifted and talented
program. The appeal must be sustained in part.

Respondent offers a gifted and talented program of
instruction in its schools. To qualify for placement in
the program, students in pre-kindergarten through second
grade take standard, citywide assessments. Parents seeking
admission to a kindergarten through third grade gifted and
talented program for the 2015-2016 school year were
required to submit a request for testing by November 7,
2014.

Parents may be able to designate a preference for
their child's placement, depending on the child's score on
the assessment. The placement preference options are:
"district gifted and talented program preferences," where
the student may choose a program in an elementary school
which offers priority placement to students who live within
the attendance zone; and "citywide gifted and talented
program preferences," which accept students from all areas

of respondent's district without priority consideration for district residence.

Respondent's gifted and talented assessment is comprised of a non-verbal test, the Naglieri Nonverbal Ability Test ("NNAT"); and a verbal test, the Otis-Lennon School Ability Test ("OLSAT") (collectively "the assessment"). Both the NNAT and the OLSAT are developed and provided by a third-party vendor. Eligibility for gifted and talented programs is determined based on a student's performance on both tests. The vendor calculates a student's raw score on each test. That raw score is then converted to a percentile rank based on the student's age at the time of the test. Such calculation ensures that, when determining a student's percentile rank, students are compared against the scores of similarly-aged students, within a three month age band. The percentile scores on the NNAT and the OLSAT are then combined to provide the student an overall gifted and talented percentile rank, which determines whether a student is eligible to apply, and if so, to which program preference - district or citywide - the student is entitled.

Students must score at the 90th percentile or above to be eligible for district programs. Students who exceed that threshold and score at the 97th percentile and above are eligible for priority placement in a citywide program. To determine eligibility for placement in a gifted and talented program during the 2015-2016 school year, the assessment was administered in January and February 2015.

Approximately 40,000 students took the assessment in 2015 and, based on their performance, approximately 9,000 students were eligible to apply for citywide and district programs for the 2015-2016 school year. Scores were mailed to students on or about April 6, 2015. Students whose percentile rank made them eligible to apply for a gifted and talented placement had until April 23, 2015 to submit applications for gifted and talented programs, ranking them in order of preference. According to respondent, placement offers for eligible students were then made "based on the following priorities: (1) sibling priority; (2) percentile rank; and (3) the district in which the student is zoned for elementary school." According to respondent, approximately 7,500 students applied for the approximately 4,000 gifted and talented placements available for the 2015-2016 school year. Respondent indicated that placement

offers were promised to be mailed during the week of May 25, 2015.

Petitioners are the parents of G.G.C., a five-year-old student, seeking admission to a specific citywide gifted and talented program based on respondent's gifted and talented assessment administered to students born in 2010. G.G.C., then four years old, took the gifted and talented assessment on February 1, 2015. Petitioners received G.G.C.'s assessment scores on April 6, 2015. G.G.C. scored in the 73rd percentile on the OLSAT, and in the 99th percentile on the NNAT, for a combined gifted and talented rank in the 93rd percentile. Based on the assessment results, petitioners were required to submit applications and placement preferences for gifted and talented programs by April 23, 2015. Petitioners' other child is a student in a citywide gifted and talented program at the Anderson School. As such, if G.G.C. achieved a score of at least the 97th percentile on the assessment, she would be eligible to receive sibling priority for admission into the Anderson School's citywide gifted and talented program. However, while G.G.C.'s assessment scores were high enough for placement in a district gifted and talented program, such scores did not reach the requisite 97th percentile for admission into a citywide program.

Petitioners allege several irregularities in the administration and scoring of the gifted and talented assessment administered to G.G.C. on February 1, 2015, which they claim negatively impacted her score. Specifically, petitioners allege that respondent erred in calculating G.G.C.'s age at the time of testing, which impacts her percentile rank. Relating to the administration of the assessment, petitioners allege that G.G.C. "had difficulty understanding her proctor on account of her accent" which impeded G.G.C.'s performance, that the proctor did not provide G.G.C. with a break where such a break was indicated on the test booklet, and that the proctor limited the amount of time in which students had to complete the untimed tests. Additionally, petitioners allege that respondent's procedure and corresponding 48-hour timeline for raising concerns relating to the administration of the gifted and talented assessment does not provide adequate due process, and is "illogical, arbitrary, capricious, and unreasonable."

Petitioners allege that, but for such irregularities, G.G.C. would have achieved a score at or above the 97th percentile, and would therefore have been eligible to apply for admission to the Anderson School where her sibling attends. Petitioners commenced this appeal on May 6, 2015, seeking an order staying respondent from validating G.G.C.'s assessment score, and directing respondent to allow G.G.C. to retake the OLSAT prior to the mailing of placement offers to students seeking gifted and talented placements on or about May 23, 2015.

As further relief, petitioners seek an order requiring respondent to implement an appeals process which provides a meaningful opportunity for parents to review the results of their child's assessment prior to the expiration of the appeals timeline, and further requiring that such process is completed before admissions decisions are made for the following school year. Petitioners also seek an order directing respondent to re-score G.G.C.'s OLSAT, and to permit G.G.C. to re-take the OLSAT. Petitioners' request for interim relief was denied on May 21, 2015.

Respondent asserts that, contrary to the published rules related to the administration of the assessment, petitioners did not contact respondent within 48 hours of the assessment to raise any concerns relating to the test administration. Respondent further asserts that the calculation of G.G.C.'s age at the time of the assessment and her score were properly calculated. In fact, contained within respondent's affidavit in opposition to petitioners' request for a stay, respondent re-calculated G.G.C.'s age at the time of test, using a formula which assigns students to age brackets based on the student's birth date, with students born toward the beginning or end of a month receiving a one-month adjustment that could result in assignment to a lower or higher age bracket, respectively. Students born mid-month, such as G.G.C., do not receive that adjustment. Such re-calculation confirmed that G.G.C.'s age at the time of assessment was properly calculated, and that her overall percentile rank was 93%. In response to petitioners' claim that G.G.C. should have been placed in a lower age bracket, respondent also calculated what the percentile rank would have been had G.G.C. been in that age bracket. If that age calculation was correct, G.G.C.'s overall percentile rank would have been 94%, still insufficient for admission to a citywide program.

Furthermore, respondent asserts that petitioners' due process claims are without merit and that the challenges relating to the actual administration of G.G.C.'s assessment should be dismissed as time-barred, as they were not raised within 30 days of the administration, and for failure to exhaust administrative remedies because petitioners did not notify respondent of such claims within 48 hours of the test administration, as required by respondent's gifted and talented assessment policy. Respondent further asserts that the petition fails to state a claim upon which relief can be granted, that respondent's actions "had a rational basis and were not made in violation of lawful procedure, affected by an error of law, arbitrary and capricious, or an abuse of discretion."

I must first address a procedural matter. Additional affidavits, exhibits and other supporting papers may only be submitted with the prior permission of the Commissioner (8 NYCRR §276.5). While this provision permits the submission of additional evidence, it cannot be used to add new claims against a respondent for which notice has not been provided (Appeals of Gonzalez, 48 Ed Dept Rep 405, Decision No. 15,898; Appeal of Marquette, et al., 48 id. 193, Decision No. 15,833). I will not accept materials that raise new issues and introduce new exhibits that are not relevant to the claims originally raised in the appeal (Appeals of Gonzalez, 48 Ed Dept Rep 405, Decision No. 15,898; Appeal of Marquette, et al., 48 id. 193, Decision No. 15,833).

By letter dated July 6, 2015, petitioners sought permission to submit an additional affidavit along with their memorandum of law. Such request was granted, as the additional affidavit contained factual assertions that directly related to petitioners' original claims and were based on information learned when respondent permitted petitioners to view G.G.C.'s actual test booklet on June 1, 2015, well after the filing of this appeal. Respondent objected to such submission, but was permitted to respond to petitioners' assertions and in fact submitted two responsive affidavits which were received by my Office of Counsel on August 6, 2015. To the extent that such additional information contained within the affidavits relates to the claims originally raised in the appeal, I have considered them.

With respect to petitioners' claims relating to the administration and scoring of the gifted and talented assessment, the relief sought by petitioners was an order staying respondent from validating G.G.C.'s assessment score and directing respondent to allow G.G.C. to re-take the OLSAT prior to the mailing of placement offers to students seeking gifted and talented placements on or about May 23, 2015. Petitioners' request for interim relief was denied on May 21, 2015 and the record indicates that respondent offered gifted and talented placements during the week of May 25, 2015. The Commissioner will only decide matters in actual controversy and will not render a decision on a state of facts which no longer exist or which subsequent events have laid to rest (Appeal of a Student with a Disability, 48 Ed Dept Rep 532, Decision No. 15,940; Appeal of M.M., 48 id. 527, Decision No. 15,937; Appeal of Embro, 48 id. 204, Decision No. 15,836). Therefore, because the specific relief requested by petitioners could not be granted after placement offers were made, petitioners' claims related to the administration of G.G.C.'s assessment must be dismissed as moot.

Respondent seeks the dismissal of petitioners' challenges to the administration of the assessment for failure to exhaust administrative remedies because petitioners failed to raise the concerns within 48 hours of the administration of the assessment pursuant to respondent's policy and only raised such concerns after receipt of G.G.C.'s scores. To the extent that petitioners challenge respondent's assessment appeals process, I decline to dismiss petitioners' claims for failure to exhaust administrative remedies because petitioners are challenging the very administrative appeals process which respondent asserts was required to be commenced within 48 hours of the assessment administration.

Respondent further claims that because the assessment was administered on February 1, 2015, any claims surrounding the assessment conditions were required to be commenced within 30 days of such administration. An appeal to the Commissioner must be commenced within 30 days from the making of the decision or the performance of the act complained of, unless any delay is excused by the Commissioner for good cause shown (8 NYCRR §275.16; Appeal of Lippolt, 48 Ed Dept Rep 457, Decision No. 15,914; Appeal of Williams, 48 id. 343, Decision No. 15,879). Petitioners commenced this appeal on March 6, 2015, within 30 days of

receipt of the assessment scores. To the extent that petitioners are challenging respondent's appeals policy itself as arbitrary, capricious and unreasonable, I decline to dismiss such claim as untimely.

To the extent that petitioners challenge the reasonableness of respondent's appeals policy, such claims must be sustained. Petitioners assert that respondent's process for raising concerns relating to the administration and scoring of the gifted and talented assessment is patently unfair, and cannot provide any meaningful relief. Specifically, as it relates to four-year-old students seeking admission to kindergarten placements, petitioners assert that children at such a young age may not readily discern a violation of procedure during the assessment and raise such concerns to their parents within the 48-hour time limitation, and that requiring parents to bring an appeal about two months prior to the release of the test scores to parents is patently unfair and irrational.

Upon receipt of G.G.C.'s assessment score, and prior to commencing this appeal, petitioners requested access to their child's actual test booklet, her answers and the proctor's instructions. Respondent provided petitioners such an opportunity on June 1, 2015, the week after placement offers were made. Respondent permitted petitioners to view the test booklet and meet with the New York City Department of Education's Test Review Facilitator. Petitioners assert that their concerns that G.G.C.'s performance on the OLSAT resulted from the failure of the proctor to follow test administration policy and provide G.G.C. with a break, were confirmed by such meeting. Petitioners further assert that, upon their review of the actual questions, they noted an absence of a pattern of the types of questions G.G.C. answered incorrectly, leading petitioners to believe that she was getting them wrong because she was tired and needed a break. Petitioners assert that during this meeting they learned of a protocol for administering a breach assessment and for the first time insist that, "[o]ur daughter must have a fair opportunity to re-test with the 'breach' protocol so that she is not unfairly excluded from Anderson based on a flawed test administration." Petitioners also contend that respondent erroneously calculated G.G.C.'s age at the time of the test, which resulted in the improper calculation of G.G.C.'s score.

Respondent disputes petitioners' characterization of the test review meeting, and contends that failure to provide a break, in and of itself, without specific evidence of an adverse impact on the child would not be sufficient grounds for a re-test. As noted previously, respondent asserts that it re-calculated G.G.C.'s score and confirmed that her age at the time of the test was correctly calculated and further asserts that even if G.G.C. has been placed in a lower age bracket, her score would not have qualified her for admission to a citywide program. With respect to petitioners' claim that respondent does not provide an adequate appeal process, respondent contends that the 48-hour appeal process is sufficient, that due process does not require respondent to have an appeals process and that petitioners are afforded the process they are due through review by the Commissioner in this appeal pursuant to Education Law §310 or review by the courts.

With respect to petitioners' due process claims, it is well-settled that an appeal to the Commissioner is not the proper forum to adjudicate novel issues of constitutional law or to challenge the constitutionality of a statute or regulation (Appeal of C.S., 49 Ed Dept Rep 106, Decision No. 15,971; Appeal of J.A., 48 id. 118, Decision No. 15,810; Appeal of Keller, 47 id. 224, Decision No. 15,677). A novel claim of constitutional dimension should properly be presented to a court of competent jurisdiction (Appeal of J.A., 48 Ed Dept Rep 118, Decision No. 15,810). In Matter of Bennet v. City School District of the City of New Rochelle, 114 AD2d 58, the court ruled that parents do not have a right under Article XI, §1 of the New York Constitution to placement of their child in a gifted and talented program. I agree with petitioners that Matter of Bennett and New York Civil Liberties Union, et al. v. State of New York, 4 NY3d 175, cited by respondent for the proposition that the 48-hour appeals process provides due process, are not dispositive of petitioners' due process rights. However, Matter of Bennett does establish that there is no entitlement to a gifted and talented program, which is a discretionary educational program and not a matter of fundamental right. This has a bearing on determining the process that is due (see Matthews v. Eldridge, 424 U.S. 319; Matter of Board of Educ. of Northport-East Northport Union Free School Dist. v. Ambach, 90 AD2d 227). The parties cite to no cases that address the extent of the process that is due in this context given

petitioners' limited property interest. Therefore, I decline to address whether respondent's appeal process is consistent with due process, which is properly determined by the courts.

As to respondent's argument that petitioners are afforded the requisite due process through this administrative appeal to the Commissioner, in Takeall v. Ambach, 609 FSupp 81, a federal District Court ruled that due process requires that written notice of the availability of an administrative appeal under Education Law §310 be provided together with a statement of the reasons for the determination. On this record, respondent did not provide parents with notice in the Gifted and Talented Program Handbook: For students seeking placement in September 2015 (Students born in 2010) that an administrative appeal could be brought to the Commissioner. Instead, respondent referred to a local appeals process in which appeals must be brought in writing within 48 hours of the exam administration. For purposes of this appeal, respondent cannot now claim that there was no local appeals process to be reviewed in this appeal, whether or not the availability of an appeal to the Commissioner helps provide petitioners with the process they are due.

Even if I assume that petitioners have been provided all the process they are due, respondent's 48-hour appeals process cannot stand if it is arbitrary and capricious. Petitioners assert that respondent's appeals process is "completely irrational and patently unfair" in that it requires that an appeal be initiated within 48 hours of administration, months before parents receive their children's scores. I agree, and I find that respondent's policy of requiring that appeals relating to assessment administration and scoring be initiated within 48 hours of test administration is not rational or reasonable. It is neither reasonable nor educationally sound to expect an impressionable child of the tender age of four years old to immediately recognize and report problems with test administration. Further, it is neither rational nor reasonable to require parents to challenge the scoring of their child's examination before his or her results are made available to the parents.

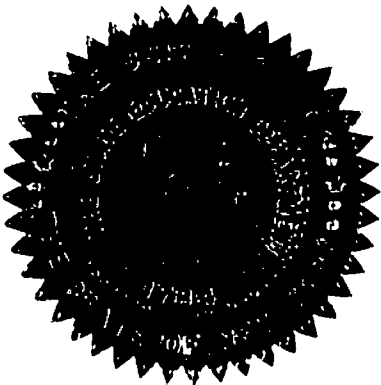
Therefore, I find that respondent's appeals process for students seeking admission to kindergarten gifted and talented programs, under which appeals must be taken within

48 hours of administration and prior to the parents' receipt of test scores, is unreasonable and irrational and denies parents a meaningful opportunity to challenge the assessments. Therefore, the appeals process is arbitrary and capricious and must be annulled. While I fully appreciate the timing issues that respondent faces in administering the assessments and making timely placement decisions based upon the resulting scores, respondent cannot adopt an appeals process that cuts off parents' right to appeal before the parents receive their children's test scores. Respondent may, of course, adopt a reasonable time-limited appeals process that commences upon parents' receipt of test scores, and make adjustments in its placement timeline and procedures. To this end, I am directing my Office of P-12 Education Policy to provide guidance and technical assistance to respondent in order to ensure that its appeals process and procedures are consistent with this decision.

In light of this disposition, I need not consider the parties' remaining contentions.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that respondent review and modify the appeals process relating to the administration and scoring of assessments for students seeking admission to kindergarten gifted and talented programs, to ensure that such process provides parents with a meaningful opportunity to review and challenge their children's assessment results after they receive such assessment results.



IN WITNESS WHEREOF, I, MaryEllen Elia, Commissioner of Education of the State of New York, for and on behalf of the State Education Department, do hereunto set my hand and affix the seal of the State Education Department, at the City of Albany, this 3rd day of April 2017.

MaryEllen Elia

Commissioner of Education