

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

Pennsylvania

## Special Education Hearing Officer

### DECISION

Child's Name: J. K.

Date of Birth: [redacted]

Dates of Hearing:

May 25, 2016

May 26, 2016

June 8, 2016

June 15, 2016

### CLOSED HEARING

ODR Case #17187-1516AS

Parties to the Hearing:

Representative:

Parent[s]

Pro Se

Owen J. Roberts School District  
3650 St. Peters Road  
Elverson, PA 19520

David Painter, Esquire  
331 East Butler Avenue  
New Britain, PA 18901

Date of Decision:

July 30, 2016

Hearing Officer:

Michael J. McElligott, Esquire

## **INTRODUCTION**

Student<sup>1</sup> is an elementary school age student residing in the District who has been identified as a student with a disability under the Individuals with Disabilities in Education Improvement Act of 2004 (IDEIA)<sup>2</sup>. The student has been identified under the terms of IDEIA as a student with the health impairment of attention deficit hyperactivity disorder (“ADHD”), specific learning disability, and speech/language impairment.

The student was initially evaluated, and identified as a student who required special education under the IDEIA, in November 2013 while a resident in a nearby school district. In May 2015, the parents requested that the student be re-evaluated by the District. In October 2015, the District issued its re-evaluation report (“RR”).

On December 23, 2015, after meetings of the student’s individualized education plan (“IEP”) team through the fall of 2015, the parents filed a special education due process complaint at this file number, alleging that the student was denied a free appropriate public education (“FAPE”). At some point in the midst of these matters, the parents requested an independent educational evaluation (“IEE”) at public expense. On December 31, 2015, pursuant to 34 C.F.R.

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<sup>1</sup> The generic “student”, and gender-neutral pronouns will be utilized throughout the decision to protect the student’s confidentiality.

<sup>2</sup> It is this hearing officer’s preference to cite to the implementing regulation of the IDEIA at 34 C.F.R. §§300.1-300.818. *See also* 24 PA Code §§14.101-14.162.

§§300.502(b)(1),(2); 22 PA Code §14.102(a)(2)(xxix), the District filed a special education due process complaint in defense of its evaluation process/report at ODR file number 17196-1516AS. A complicated procedural history ensued, which is detailed below.

In terms of the issues in this matter, parents' complaint of December 2015 contains three issues: (1) the appropriateness of the student's individualized education plan ("IEP") from November 2015, (2) the appropriateness of the proposed IEP of April 2016, and (3) claims that the District discriminated against the student, and retaliated against the student's family, in violation of Section 504 of the Rehabilitation Act of 1973 ("Section 504").<sup>3</sup>

For the reasons set forth below, I find in favor of the District.

### **ISSUES**

Is the proposed IEP from November 2015 appropriate?

Is the proposed IEP from April 2016 appropriate?

Did the District fail in its obligations under Section 504?

### **PROCEDURAL HISTORY**

A. On December 23, 2015, parents filed a complaint in this matter at 17187-1516AS, scheduled for hearing on February 11, 2016. (Hearing Officer Exhibit ["HO"]-1).

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<sup>3</sup> It is this hearing officer's preference to cite to the pertinent federal implementing regulations of Section 504 at 34 C.F.R. §§104.1-104.61. *See also* 22 PA Code §§15.1-15.11 wherein Pennsylvania education regulations explicitly adopt the provisions of 34 C.F.R. §§104.1-104.61 for services to "protected handicapped students".

- B. On December 31, 2015, the District filed the complaint at 17196-1516AS, also scheduled for hearing on February 11, 2016. (HO-2).
- C. In January 2016, the hearing officer communicated with the parties in both matters, regarding prehearing directives. He also requested a conference call to discuss hearing matters. (HO-3).
- D. Parents were working with a special education attorney as a behind-the-scenes consultant in their complaint at 17187, but this individual did not enter an appearance for the family. The hearing officer informed the parties that he could not communicate with a third-party who was not an attorney who had entered an appearance, so that individual was not copied on subsequent emails sent by the hearing officer. (HO-4).
- E. On January 26, 2016, the two matters at 17187 and 17196 were formally consolidated by the hearing officer to be heard in one hearing process. Thereafter, hearing planning and communications proceeded simultaneously as to both complaints. (HO-5).
- F. The parties requested rescheduling of the February 11<sup>th</sup> hearing date. Unable to collaborate in finding a mutually-available hearing for both parties, the hearing officer was directive in rescheduling the hearing to March 18, 2016. (HO-6).
- G. On February 3, 2016, the hearing officer held a conference call with the student's mother and counsel for the District. The call lasted approximately one hour. (HO-7).
- H. On March 8, 2016, at parents' request, the hearing officer held a 50-minute conference call with the student's mother and counsel for the District. The student's mother indicated additional issues for consideration. The hearing officer allowed parents to amend their complaint at 17187, and the March 18<sup>th</sup> hearing date was continued. (HO-8).
- I. On March 14, 2016, parents filed an amended complaint at 17187. (HO-9).
- J. On March 18, 2016, parents requested another conference call. The hearing officer declined to hold another conference call and was directive in the matter of scheduling hearing dates. Parents had requested evening hearing sessions; the District indicated that it could accommodate that, but that evening sessions presented an inordinate complication of its personnel issues. The hearing officer

- compromised the two positions, instructing the parties that the hearing sessions would convene at 12-noon and be held into the early evening. (HO-10).
- K. The hearing officer scheduled five sessions, on April 14<sup>th</sup>, May 19<sup>th</sup>, May 20<sup>th</sup>, May 25<sup>th</sup>, and May 26<sup>th</sup>. (HO-11).
- L. Parents indicated that they could not attend the hearing session on April 14<sup>th</sup>. The hearing officer gave parents a choice: Parents could attend the April 14<sup>th</sup> session as scheduled, or that session could be cancelled but the start-time at two of the May sessions would need to move to the morning—in effect, splitting the April 14<sup>th</sup> session and re-allocating that hearing time to two of the May dates. Parents chose to have the April 14<sup>th</sup> session cancelled, and the start-time for the sessions on May 25<sup>th</sup> and May 26<sup>th</sup> was moved to 8:30 AM. (HO-12).
- M. In mid-April 2016, the parent emailed to request that disagreement with an April 2016 IEP process be heard. The parties agreed to present those issues in the combined process at 17187/17196. (HO-13).
- N. On May 9, 2016, parents requested subpoenas for twelve witnesses. Parents also indicated that they wished to question nine District witnesses. The hearing officer indicated that this was too many witnesses for the issues presented. (HO-14).
- O. On May 12, 2016, the hearing officer provided directives to the parties. Each of the four scheduled hearing sessions would be dedicated to one issue—the May 19<sup>th</sup> session would be dedicated to evidence on the District’s complaint at 17196 in defense of its evaluation process/report; the May 20<sup>th</sup> session would be dedicated to evidence on the fall 2015 IEP issues in the parents’ complaint and amended complaint at 17187; the May 25<sup>th</sup> session would be dedicated to evidence on the April 2016 IEP issues; and the May 26<sup>th</sup> session would be dedicated to evidence on parents’ claim that the District had retaliated against the parents for pursuit of special education due process. (HO-15).
- P. Each party was limited to three witnesses per session, for a total of six witnesses per session. One of parents’ witnesses each day would be the student’s mother, who would testify as to each issue on each day. The five witnesses to undergo examination would be allotted 1.5 hours of questioning time for each, leading to 7.5 hours of examination; the testimony of student’s mother would be allotted 45 minutes for a narrative statement and another 45

- minutes for cross-examination by District counsel at each session, for a potential total of 9 hours of testimony per session. (HO-15, HO-16).
- Q. Each party was instructed to declare their witnesses and inform the hearing officer by 4 PM on May 16, 2016. The District complied. The parents declared their witnesses but did not copy the hearing officer. Therefore, the hearing officer was not apprised of the parents' witnesses until the morning of May 17, 2016 when District counsel forwarded the parents' email declaration. (HO-17).
- R. Parents had not provided requisite information for subpoenas for the witnesses. This information was requested by the hearing officer but was not provided until approximately 2:30 PM on May 18, 2016. Due to a hearing session in another matter in a different part of the Commonwealth that lasted until the early evening, and travel thereafter for the May 19<sup>th</sup> hearing session, the hearing officer could not issue the subpoenas until the evening of May 18, 2016 for parents' two requested witnesses on May 19<sup>th</sup> session. (HO-18).
- S. On the morning of May 19, 2016, the student's mother indicated she was not feeling well and requested continuance of the hearing session, set to convene at 12-noon that day. The hearing officer declined to continue the hearing session. The parent was offered the opportunity to participate by telephone but did not choose to do so. The hearing proceeded in the absence of the student's mother. (HO-19).<sup>4</sup>
- T. Because, to that point, the matters at 17187 and 17196 had been handled together, when it became apparent that parents would not appear at the hearing as scheduled on May 19<sup>th</sup>, the hearing officer de-coupled the two complaints. The record developed on May 19, 2016, was utilized solely for evidence on the District's complaint at 17196 (as had been planned). The decision at 17196-1516AS was issued on May 31, 2016.
- U. The parents' complaint/amended complaint related to the fall 2015 IEP, and the issues related to the April 2016 IEP, all at this file number, were heard at hearing sessions on May 25<sup>th</sup>, May 26<sup>th</sup>,

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<sup>4</sup> One of the two witnesses requested by parent, and subpoenaed the evening before, responded through counsel on the morning of May 19<sup>th</sup> that she could make herself available to testify. The witness and her counsel were informed that the student's mother was not participating at that session. The second witness did not respond to the hearing officer, or District counsel, in any way regarding the May 19<sup>th</sup> session. (HO-21).

June 8<sup>th</sup>, and June 15<sup>th</sup>. (HO-20; Notes of Testimony [“NT”] at 6-1118).

- V. The hearing officer attempted to coordinate witnesses’ testimony and issued subpoenas at parents’ request. (HO-22, HO-23, HO-24, HO-25, HO-27).<sup>5</sup>

## **FINDINGS OF FACT**

### Prior to 2015-2016 School Year

1. In February 2011, the student was identified by an out of state school district as a student with autism. This explicit evaluation and identification was not shared with the District until October 2015. (Parent Exhibit [“P”]-1, P-2, P-80).
2. In the fall of 2013, the student began school-aged services in kindergarten in a nearby school district. (School District Exhibit [“S”]-1).
3. Early on in the 2013-2014 school year, in November 2013, the student was evaluated by the nearby school district. In the November 2013 evaluation report (“ER”) student was identified as a student eligible under the IDEIA as a student with ADHD due to inattention, impulsivity, and hyperactivity. The student was also identified as a student with a speech/language impairment. The ER also recommended supports in occupational therapy. (S-1).

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<sup>5</sup> One of parents’ subpoenaed witnesses, a former family physician, refused to comply with the subpoena and did not testify. (HO-26; NT at 264-271).

4. The student began to reside in the District in 1<sup>st</sup> grade, the 2014-2015 school year, where the student had an IEP dated September 30, 2014. The IEP team met and revised the student's IEP, at parents' request, in October 2014, November 2014, January 2015, February 2015, March 2015, and April 2015. (S-51).
5. In the fall of 2014, the elementary building principal from the nearby school district where the student attended the 2013-2014 school year attended a professional development meeting at the District elementary school which the student attended. The purpose of the visit was to observe and to discuss certain elements of the District's elementary curriculum as the nearby school district was considering utilizing the same curriculum. (NT at 764-849).
6. In May 2015, parents requested that the student be re-evaluated by the District and provided written consent for the evaluation in June 2015. (S-55, S-56).



November 2015 IEP<sup>6</sup>

7. The student began the 2015-2016 school year with the IEP developed and accepted by parents at the end of the prior school year. (S-51, S-52).
8. In early September 2015, the District requested permission to conduct a functional behavior assessment (“FBA”). (S-65).
9. In late September 2015, the student’s IEP was revised at the annual meeting for the student’s IEP. (S-68).
10. The IEP team was unable to come to an agreement about the student’s IEP. Additionally, at the time of the September 2015 IEP meeting, the re-evaluation requested at the end of the prior school year had not yet been completed and the FBA had not yet been completed. Therefore, important additional information was not on hand to finalize the student’s IEP. (P-77, P-78, P-89; S-55, S-56, S-65).
11. In October 2015, the District issued its re-evaluation report (“RR”). (S-73).
12. The October 2015 RR identified the student as a student with the health impairment of attention deficit hyperactivity

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<sup>6</sup> As set forth below in Finding of Fact 14, the IEP considered by the student’s IEP team, and formally offered by the District through a notice of recommended educational placement (“NOREP”) is from December 2015, containing revisions of the November 2015 IEP. Over the course of the case, however, the document under consideration at that time has been referred to consistently as the ‘November IEP’. Therefore, for consistency across the record, reference to the ‘November 2015’ IEP is used in this decision even though, formally, the IEP at issue between the parties from that period was offered in December.

disorder (“ADHD”), specific learning disability in reading fluency, and speech/language impairment. (S-73).

13. The October 2015 RR indicated that, as a result of these identifications, the student had needs in the following areas: reading fluency, spelling, attention/impulsivity, and speech/language (grammar, syntax, listening comprehension). Additionally, the RR identified needs for vision support (redacted) and occupational therapy (“OT”). (S-73, S-75).<sup>7</sup>
14. Nearly contemporaneously with the issuance of the RR, parents filed a complaint with the Pennsylvania Department of Education-Bureau of Special Education. (P-82, P-83, P-84).
15. In November 2015, the student’s IEP team met to design the student’s IEP based on the October 2015 RR. The IEP was revised in December 2015. (S-88, S-97).
16. The November 2015 IEP contained present level data and assessments in reading, written expression, listening comprehension, and mathematics; speech/language, functional vision, OT, central auditory processing disorder. (S-97 at pages 4-24).
17. The November 2015 IEP contained the results of the FBA, completed by an intermediate unit board-certified behavior analyst

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<sup>7</sup> At 17196-1516AS, the October 2015 RR was determined to be appropriate. See *Procedural History* section above.

- “BCBA”). The BCBA found that the student did not engage in behaviors that impeded the student’s learning or the learning of others and did not require a behavior plan or behavioral interventions. (S-97 at pages 24-30).
18. The November 2015 IEP contained a social skills evaluation. (S-97 at pages 30-31).
  19. The November 2015 IEP contained extensive parental input. (S-97 at pages 31-37).
  20. The November 2015 IEP contained two OT goals, four speech/language goals, and one reading fluency goal. (S-97 at pages 41-44).
  21. Vision support in the form of [redacted] was removed from the November 2015 IEP, based on the updated recommendation of an intermediate unit functional vision evaluation and the report of a private developmental optometrist. (S-97 at pages 21-22, 44).
  22. The November 2015 IEP contained modifications to accommodate the student’s allergies, as well as classroom accommodations, OT accommodations, vision support accommodations, speech/language accommodations, and social skills sessions (“lunch bunch”), and trial use of an FM system. The IEP included specially-designed instruction in reading, and direct instruction in OT and speech/language. (S-97 at pages 44-47).

23. The November 2015 IEP recommended placement in itinerant learning services, with the student spending 92% of the school day in regular education. (S-97 at pages 49-50).
24. The District recommended the November 2015 IEP through a NOREP issued on December 18, 2015, returned by parents on December 23<sup>rd</sup> indicating disagreement with the IEP and requesting a special education due process hearing. (S-98, S-99).
25. On December 17, 2015, the day before the District issued the NOREP, the Pennsylvania Department of Education-Bureau of Special Education issued its complaint investigation report. The complaint investigation report found that the District needed to make up four missed “lunch bunch” sessions and needed to remind its staff about the procedures on timing of IEP meetings and inclusion of parent input in IEPs. (P-113).
26. On December 23, 2015, the same day that the District received the NOREP from parents, they filed the complaint which led to this due process hearing. (S-102).
27. Over the period of September – December 2015, the parties communicated extensively, sharing emails on views, evaluation data, and IEP drafts. (P-63, P-64, P-65, P-66, P-67, P-69, P-76, P-77, P-78, P-80, P-81, P-86, P-87, P-88, P-89, P-90, P-91, P-92, P-93, P-94, P-95, P-96, P-97, P-98, P-99, P-101, P-102, P-103, P-

104, P-105, P-106, P-107, P-108, P-109, P-110, P-111, P-112, P-115, P-116; S-65, S-67, S-77, S-100, S-130).

#### April 2016 IEP

28. The parties continued to communicate extensively over the period January – March 2016. (P-121, P-123, P-124, P-125, P-126, P-130, P-131, P-132, P-135, P-136, P-141, P-142, P-143, P-144).
29. The April 2016 IEP contained updated present level data and assessments in reading fluency, spelling, and mathematics; speech/language, vision support, OT, auditory processing. (S-118 at pages 4-7, 9, 11, 19, 26-29).<sup>8</sup>
30. The April 2016 IEP contained extensive parental input; the parental input section is the largest part of the 71-page IEP. (S-118 at pages 38-56).
31. The April 2016 IEP contained the same goals as the November 2015 IEP: two OT goals, four speech/language goals, and one reading fluency goal. (S-97 at pages 41-44).
32. In updated evaluation data from the student's occupational therapist, the student had met OT goals and, in her opinion, no longer required OT services. The student had mastered one of the speech/language goals. (S-118 at pages 19, 27, 60-61).

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<sup>8</sup> The April 2016 IEP included a private autism diagnosis summary. (P-123; S-105, S-118 at page 37). The issue of the student's potential identification as a student with autism was addressed in the decision at 17196-1516AS.

33. The April 2016 2015 IEP contained the same program modifications as the November 2015 IEP, although additional accommodations/instruction were added for spelling. Due to goal mastery, the April 2016 IEP recommended reducing OT services to 15 minutes monthly for teacher/therapist consultation. An intermediate unit audiologist also recommended that the student did not require a FM system. The IEP included specially-designed instruction in reading, and direct instruction in OT and speech/language. (S-118 at pages 28-29, 64-67).
34. The April 2016 IEP continued to recommend placement in itinerant learning services, with the student spending 94% of the school day in regular education. (S-118 at pages 69-71).
35. The District offered the April 2016 IEP through a NOREP which was rejected by parents. (S-122).
36. The student made progress over the course of the 2015-2016 school year. (P-150, P-152, P-156, P-157; S-97, S-118; NT at 39-264, 410-555).

## **DISCUSSION AND CONCLUSION OF LAW**

### IDEIA/Denial of FAPE

To assure that an eligible child receives a FAPE (34 C.F.R. §300.17), an IEP must be reasonably calculated to yield meaningful educational benefit to the student. Board of Education v. Rowley, 458 U.S. 176, 187-204 (1982). ‘Meaningful benefit’ means that a student’s program affords the student the opportunity for “significant learning” (Ridgewood Board of Education v. N.E., 172 F.3d 238 (3<sup>rd</sup> Cir. 1999)), not simply *de minimis* or minimal education progress. (M.C. v. Central Regional School District, 81 F.3d 389 (3<sup>rd</sup> Cir. 1996)).

Here, both the November 2015 and April 2016 IEPs were reasonably calculated to yield meaningful education benefit. The student’s needs were comprehensively identified through multiple assessments and input, including extensive parental input. Measurable goals were written based on this data to address the student’s areas of need, in addition to individualized modifications and instruction in other areas where the student required support. Over the course of the 2015-2016 school year, even though the student’s programming was in flux given non-agreement of the parties and, ultimately, due process, the record shows that the student made progress.

When read in its entirety, the record reveals that over the course of the 2015-2016 school year, the student’s IEP team became nearly

paralyzed by the level of parental input and communication. This is not to say that parent's participation as part of the IEP team (both at IEP meetings and over the course of the school year) is unwelcome; indeed, it is with a degree of respect that one encounters this record—the time and energy to produce the volume of email and input for the IEP team, and its level of detail, is impressive. Yet it veered from engaging to overwhelming.

Now, here and there, aspects of the District's processes and programming were not perfected. Parents were concerned over these things. But the overarching goal of the evaluation and IEP team processes is not perfection, it is the design and implementation of educational programming that is reasonably calculated to yield meaningful education benefit. A focus, then, on the vital documentation in the student's special education program—the RR, the IEPs, the student's progress—reveals that the student's program, by design and implementation provided the student with a FAPE, and quite successfully.

#### Section 504/Discrimination

The anti-discrimination provisions of Section 504 bar a school district from discriminating against a student on the basis of disability. (34 C.F.R. §104.4). A student with a disability who is otherwise qualified to participate in a school program and, as a result of that disability, has



been denied access to school programming, was denied the benefits of school programming, or otherwise discriminated against, may have been discriminated against in violation of Section 504 protections. (34 C.F.R. §104.4; S.H. v. Lower Merion School District, 729 F. 3d 248 (3d Cir. 2013), Chambers v. School District of Philadelphia, 587 F.3d 176 (3d Cir. 2009)). A student who claims suffered disability discrimination in violation of the obligations of Section 504 must show deliberate indifference on the part of the school district in the denial-of-access, denial-of-benefits, or other-discrimination. (S.H., *infra*).

Additionally, protections against retaliation are granted under the umbrella of Section 504 where a family engages in the process of seeking educational services for students with disabilities. To establish whether a school district has retaliated against a family for engaging the processes under IDEIA/Section 504, a three-part test has been elucidated, namely: (1) did the parents engage in protected activities, (2) was the school district's retaliatory action sufficient to deter a person of ordinary firmness from exercising his or her rights, and (3) was there a causal connection between the protected activity and the retaliation? Lauren W. v. DeFlaminis, 480 F.3d 259 (3d Cir. 2007).

Here, the District did not act with indifference toward the student—deliberate or otherwise—and did not retaliate against the student or the student's family. There were two particular focuses of the parent's claims in this regard.

One, the parents felt that a professional development visit to the student's elementary school building at the District by the elementary school building principal from the nearby school district where the student had attended in the 2013-2014 was somehow nefarious or led to an inappropriate sharing of information. The testimony of that individual, and the District building principal, clearly showed that this was not the case and the visit was entirely geared to considerations of elementary curriculum-sharing between the two school districts.

Two, the parents felt that the demeanor and interactions of the District building principal, particularly, and other District personnel generally were discriminatory and/or retaliatory. (NT at 962-1111). The record in its entirety—both the documentary evidence in the form of voluminous email communications and the credibility of District witnesses who testified at the hearing—leads to a finding that at no time did District personnel discriminate in any way against the student and at no time did District personnel retaliate in any way against the student or the family. Indeed, just as one must have a degree of respect for the time and energy that the parents brought to the IEP team process, one must also have respect for the District's continued engagement and responsiveness to the parents, even when frustration mounted for both parties as to the lack of progress in finalizing the student's educational programming.

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## **ORDER**

In accord with the findings of fact and conclusions of law as set forth above, the IEPs considered on this record are appropriate. At all times, the District has provided, or stood ready to provide, a free appropriate public education to the student through the IEPs of November 2015 and April 2016.

As of the date of this order, and looking forward to the upcoming 2016-2017 school year, the April 2016 IEP shall govern the student's educational programming.

Additionally, the District has met its obligations to the student under Section 504 of the Rehabilitation Act of 1973. The District did not discriminate against the student and did not retaliate against the student or the family.

Any claim not specifically addressed in this decision and order is denied.

*Michael J. McElligott, Esquire*

Michael J. McElligott, Esquire  
Special Education Hearing Officer

July 30, 2016