

*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]

Date of Hearing: May 19, 2016

### CLOSED HEARING

ODR Cases #17196-1516AS

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 Record Closed:

May 19, 2016

Date of Decision:

May 31, 2016

Hearing Officer:

Jake McElligott, Esquire

## **INTRODUCTION**

[The Student] (“student”)<sup>1</sup> is an [early elementary school-aged] student residing in the Owen J. Roberts School District (“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 disabilities, and speech and 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, the parents filed a special education due process complaint at ODR file number 17187-1516AS. At some point in the midst of these matters, the parents requested an independent educational evaluation (“IEE”) at public expense. Pursuant

---

<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.

to 34 C.F.R. §§300.502(b)(1),(2); 22 PA Code §14.102(a)(2)(xxix), then, the District filed a special education due process complaint in defense of its evaluation process/report at this file number. A complicated procedural history ensued, which is detailed below.

For the reasons set forth below, I find in favor of the District. The October 2015 District RR was appropriate when issued. There will be a modification [of] the findings of the RR based on information developed and provided to the District after the issuance of the RR.

### **ISSUE**

Did the District evaluation process and re-evaluation report of October 2015 meet its obligations to the student under IDEIA?

### **PROCEDURAL HISTORY**

- A. On December 23, 2015, parents filed a complaint at 17187-1516AS, scheduled for hearing on February 11, 2016. (Hearing Officer Exhibit ["HO"]-1).
- B. On December 31, 2015, the District filed the complaint in this matter, 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 December 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; see generally Notes of Testimony ["NT"] at 5-148).<sup>3</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. This decision is issued on the record developed on May 19, 2016, on the District's complaint at 17196 (as had been planned). The parents' complaint/amended complaint, and the issues related to the April 2016 IEP, all at 17187, would be heard in a separate process over the following, and already scheduled, hearing dates on May 20<sup>th</sup>, May 25<sup>th</sup>, and May 26<sup>th</sup>. (HO-20; NT at 5-148).

## **FINDINGS OF FACT**

1. The student began school-aged services in kindergarten in a nearby school district. (School District Exhibit ["S"]-1).

---

<sup>3</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).

2. Early on in the 2013-2014 school year, in November 2013, the student was evaluated by the nearby school district. 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).
3. 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).
4. In May 2015, the student’s parents requested that the student be re-evaluated, and subsequently provided permission on June 10, 2015. (S-54, S-55, S-56).
5. In October 2015, the District issued a timely RR. (S-73).
6. The October 2015 RR contained significant background information and input. For the first time, parents shared a previous diagnosis of autism in an out-of-state early intervention program; while early intervention services were mentioned in the November 2013 ER performed in the nearby school district, no diagnosis of autism was mentioned in the ER. (S-1, S-73 at pages 1-4).

7. The October 2015 RR contained prior evaluation data for central auditory processing disorder. The data did not support a finding that the student had such a disorder. (S-73 at pages 3-4).
8. The October 2015 RR contained updated information on the student's then-current 15 IEP goals. (S-73 at pages 5-7).
9. The October 2015 RR contained observation and input data from the District school psychologist and the student's classroom teacher. (S-73 at pages 7-8).
10. The October 2015 RR contained cognitive assessment in the form of the Wechsler Intelligence Scale for Children/5<sup>th</sup> Edition. The student's full-scale IQ was measured at 112, in the high average range. (S-73 at pages 10-13).
11. The October 2015 RR contained an assessment of memory function in the form of the Wide Range Assessment of Memory and Learning/2<sup>nd</sup> Edition. The student scored in the above average/superior ranges on the assessment. (S-73 at page 13).
12. The October 2015 RR contained an achievement assessment in the form of the Wechsler Individual Achievement Test/3<sup>rd</sup> Edition. The student's scores were largely in the average to above average ranges (with two in the below average range and two in the superior range). (S-73 at pages 14-15).



13. The October 2015 RR contained curriculum-based measures in reading and mathematics. The student's grades throughout 1<sup>st</sup> grade were in the proficient range. (S-73 at pages 17-18).
14. The October 2015 RR contained social/emotional/behavioral assessments. (S-73 at pages 18-24).
15. The October 2015 RR contained an assessment of the student's behaviors at school and at home utilizing the Conners/3<sup>rd</sup> Edition. The student's teacher rated the student as average on all scales. The parents rated the student as very elevated on the inattention, hyperactivity/impulsivity, learning problems, executive functioning, peer relations, ADHD/inattentive type, ADHD/impulsive type, and oppositional defiant disorder scales. (S-73 at pages 18-19).
16. The October 2015 RR contained an assessment of the student's executive functioning at school and at home utilizing the Behavior Rating Inventory of Executive Function. The student's teacher did not rate the student as having elevated scores on any scale/index. The parents rated the student as having elevated scores on the following scales/indices: inhibit, shift, emotional control, behavior regulation index, initiate, working memory, plan/organize, monitor, metacognition index, and global executive composite. (S-73 at pages 20-21).

17. The October 2015 RR contained an assessment of the student's behaviors at school and at home utilizing the Behavior Assessment System for Children/2<sup>nd</sup> Edition. The student's teacher did not rate the student as clinically significant or at-risk in any measure. The parents rated the student as clinically significant for hyperactivity, conduct problems, externalizing, atypicality, the behavior symptoms index, social skills, functional communication, and adaptive skills. The parents rated the student as at-risk for aggression, anxiety, internalizing problems, adaptability, and activities of daily living. (S-73 at pages 21-23).
18. The October 2015 RR contained an assessment of behaviors associated with autism spectrum disorders, the Autism Spectrum Rating Scale. The student's teacher rated the student as average on all scales. The parents rated the student as very elevated on the scales for: social communication, unusual behaviors, self-regulation, adult socialization, social/emotional reciprocity, atypical language, and stereotypy. The parents rated the student as elevated on the scales for: peer socialization, behavioral rigidity, sensory rigidity, and attention/self-regulation. (S-73 at pages 23-24).
19. The October 2015 RR contained a comprehensive speech and language evaluation, performed by a District speech and language pathologist who has worked with the student in

delivering speech and language services in the student's IEP. (S-73 at pages 24-28; NT at 92-121).

20. The speech and language evaluation in the October 2015 RR contained multiple assessment instruments. The evaluator concluded that the student exhibited average abilities in articulation, pragmatic language skills, and receptive/expressive language skills. The evaluator concluded that the student presented with a mild language disability, requiring specially designed instruction in listening comprehension, morphology, and syntax skills. (S-73 at pages 24-28).
21. The October 2015 RR contained a comprehensive functional vision evaluation, performed by an intermediate unit ("IU") teacher of the visually impaired. (S-73 at pages 29-34).
22. The functional vision evaluation in the October 2015 RR contained data from the student's eye doctor, observation, and a functional vision evaluation across 13 assessment areas. The evaluator recommended that the student continue with a daily [redacted] program in school to strengthen a weaker eye, and that the student receive monthly observation and consultative services in vision support. (S-73 at pages 29-34).
23. The October 2015 RR contained a comprehensive occupational therapy ("OT") evaluation, performed by an

occupational therapist who provides contracted OT services to the District. (S-73 at pages 34-40).

24. The OT evaluation in the October 2015 RR contained data from previous records, observation, consultation with teacher/parent/therapist, and formalized OT assessments. The District evaluator summarized the findings of the OT evaluation and included OT needs in terms of IEP goals and specially designed instruction. (S-73 at pages 34-40, 44).
25. The occupational therapist who performed the evaluation has multiple years of experience working with students with autism. The therapist opined that she did not find, in observing and working with the student in the evaluation, [that the student required] follow-up evaluation as a student with autism. (NT at 126-144).
26. The October 2015 RR concluded that the student was eligible as a student under IDEIA as a student with ADHD, speech and language impairment, and a specific learning disability. (S-73 at page 40).
27. The October 2015 RR indicated that the data were mixed regarding an identification of the student as a student requiring specially designed instruction for autism, thereby making the student eligible under IDEIA in that identification category. The prior diagnosis from an out-of-state evaluation when the student

- was three indicated some characteristics of autism and similar splits in observations/ratings between the educational and home environments. These splits were present in the assessments of the student's behaviors by the District's 2<sup>nd</sup> grade teacher and the parents. Ultimately, the District evaluator concluded that the student did not meet the eligibility requirement under IDEIA as a student requiring specially designed instruction. (S-73 at page 42).
28. The October 2015 RR indicated multiple psychoeducational, speech and language, vision, and OT areas. Psychoeducational needs included reading fluency, spelling, attention to task (especially in non-structured settings), and hyperactivity-impulsivity. Speech and language needs included grammar, syntax, listening comprehension. Vision needs included visual accommodations [redacted]. OT needs included increased visual motor skills for shoe-tying, handwriting (speed, case-sensitivity, directionality, reduction of reversals), scanning to spot reversals, and improved self-regulation/ability to focus. (S-73 at pages 43-44).
29. In light of the parents' request for an IEE at public expense, on December 31, 2015, the District filed the complaint which led to these proceedings. (HO-2).
30. On January 13, 2016, a developmental pediatrician from the Children's Hospital of Philadelphia ("CHOP") issued a report,

medically diagnosing the student with autism spectrum disorder, specific learning disorder in reading, attention/concentration deficit, and learning disorder (slow academic fluency). (S-105 at page 5).

31. The District evaluator received the CHOP report and reviewed it at the parents' request. The evaluator did not feel it changed the student's eligibility identifications (the health impairment of ADHD, speech and language, and specific learning disability) or non-identification (autism) under IDEIA. (S-105; NT at 44-88).
32. On January 7, 2016, a staff psychologist from a community-based agency issued a psychological evaluation. The evaluation was not shared with the District until a few days prior to the May 19, 2016 hearing session. The evaluation psychiatrically diagnosed the student with developmental coordination disorder, unspecified communication disorder, ADHD, and autism spectrum disorder. The evaluator testified that the evaluation did not change her views of the student's eligibility identifications/non-identification under IDEIA. (S-128; NT at 44-88).

## **DISCUSSION AND CONCLUSION OF LAW**

To assure that an eligible child receives a FAPE (34 C.F.R. §300.17), a student must be undergo an appropriate evaluation process for initial services and, once identified as an eligible student under IDEA, must be re-evaluated periodically to make sure the student's IEP has a period sense of the student's strengths and needs, at a minimum once every three years. (34 C.F.R. §300.303; 22 PA Code §§14.102(a)(2)(xxv), 14.124).

To be found eligible as a student with a disability under IDEA, the student must be identified as having one or more of twelve explicit disabilities (including, as applicable here, a health impairment [such as ADHD], speech and language impairment, specific learning disability, and autism) and who must "by reason thereof, needs special education and related services". (34 C.F.R. §300.8(a); 22 PA Code §§14.102(a)(2)(ii)). Special education and related services are defined as, respectively, "specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability" and "developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education". (34 C.F.R. §300.34(a), 39(a)(1); 22 PA Code §§14.102(a)(2)(vii),(viii)).

Where the family of a student disagrees with the evaluation process and/or evaluation reports issued by a school district, the family

may request an IEE at public expense. (34 C.F.R. §§300.502(a),(b); 22 PA Code §14.102(a)(2)(xxix)). When faced with a request for an IEE at public expense, the school district must either (a) provide the IEE at public expense or (b) file a special education due process complaint in defense of its evaluation. (34 C.F.R. §§300.502(b)(1),(2); 22 PA Code §14.102(a)(2)(xxix)). The District in this matter has chosen the latter option.

For a school district evaluation or re-evaluation to be appropriate, the evaluation must, among many more detailed requirements, use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent....” (34 C.F.R. §§300.304(b)(1) and *see generally* 34 C.F.R. §§300.304(a),(c), 300.305-300.311; 22 PA Code §§14.102(a)(2)(xxv, xxvi)).

Here, the October 2015 RR was appropriate. The evaluation was comprehensive, containing multiple assessments across all areas that the prior evaluations, records/history, input, and IEPs indicated were potential areas of concern. Within the RR itself, detailed evaluations in speech and language, functional vision ability, and OT were undertaken by evaluators in those areas.

The October RR recommended that the prior identifications of a health impairment (ADHD) and speech and language should be continued. Additionally, the RR recommended that a specific learning



disability in reading be added to the mosaic of the student's identifications under IDEIA.

The one area which this record indicates might be a potential issue in terms of the District's October 2015 RR and its conclusions/recommendations regarding the student's identification under IDEIA is the area of autism. On one hand, the student has been medically diagnosed with autism, and this diagnosis is consistent across time—initially, in the out-of-state early intervention process, then in the diagnoses shared with the District. On the other hand, the evidence on this record is strong that, these medical diagnoses notwithstanding, the student's behaviors in the school environment did not lead anyone—teacher, service providers, evaluators—to conclude that the student required special education and related services as a result of these diagnoses.

This is the critical second prong for eligibility under IDEIA—it is not simply a diagnosis or formalized identification of a student with one, or more, of twelve enumerated disabilities. It is the diagnosis/identification and the need for special education/related services as a result. Here, on this record, it appears that the District has not been inappropriate in concluding that the student, even though diagnosed with autism, does not require special education/related services as a result.

A follow-on question is whether the District has programmed appropriately for the student's needs (whatever those may be) as the needs surface in the educational environment. Those questions will be answered in the process for issues at file number 17187-1516AS (as of the date of this decision, an ongoing process in the midst of hearing sessions.)

Accordingly, the October 2015 RR issued by the District in this matter is appropriate. Parents are not entitled to an IEE at public expense.

•

### **ORDER**

In accord with the findings of fact and conclusions of law as set forth above, the October 2015 re-evaluation report for this student issued by the School District is appropriate. Parents are not entitled to an independent educational evaluation at public expense.

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

*Jake McElligott, Esquire*

Jake McElligott, Esquire  
Special Education Hearing Officer

May 31, 2016