

*This is a redacted version of the original hearing officer decision. Select details have been removed from the decision to preserve anonymity of the student as required by IDEA 2004. Those portions of the decision which pertain to the student's gifted education have been removed in accordance with 22 Pa. Code § 16.63 regarding closed hearings.*

**PENNSYLVANIA**

**SPECIAL EDUCATION HEARING OFFICER**

DECISION

DUE PROCESS HEARING

ODR #19298/16-17 KE

Name of Child:

K.G.

Date of Birth:

[redacted]

Dates of Hearing:

July 7, 2017

CLOSED HEARING

Parties to the Hearing:

Parent[s]

Representative:

Pro Se

Downingtown Area School District  
540 Trestle Place  
Downingtown, PA 19335

Katie Metcalfe, Esquire  
Sweet Stevens Katz & Williams  
331 Butler Avenue  
New Britain, PA 18901

Date of Decision:

July 20, 2017

Hearing Officer:

Linda M. Valentini, Psy.D. CHO  
Certified Hearing Official

## Background

Student<sup>1</sup> is a mid-elementary school aged student who is enrolled in the District and who is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA) and Pennsylvania Chapter 14 under the current classification of Other Health Impairment due to elevated levels of inattention and elevated levels of anxiety. As such, the Student is also an individual with a disability as defined under Section 504 of the Rehabilitation Act, 29 U.S.C. §794 and a protected handicapped student under Pennsylvania Chapter 15.<sup>2</sup>

The District requested this hearing in response to the Parents'<sup>3</sup> request for an independent educational evaluation (IEE) at public expense because it believes that its April 18, 2017 evaluation of Student is appropriate.

The Parents assert that Student should have been classified as a student with autism. Based upon the preponderance of the evidence before me I accept the Parents' argument that the evaluation was inappropriate in this regard and will order an IEE to specifically address the question of whether Student should be classified as a student on the autism spectrum.

The Parents also contend that [redacted].

## Issue[s]

Was the District's evaluation of Student in the area of autism appropriate and if not must the District fund an Independent Educational Evaluation at public expense to address this issue?

[Redacted.]

## Findings of Fact

### IDEA Classification

1. By email dated January 16, 2017 the Parents requested that the District conduct a full psychoeducational evaluation of Student. [S-2]

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<sup>1</sup> In the interest of confidentiality and privacy, Student's name and gender, and other potentially identifiable information, are not used in the body of this decision. The identifying information appearing on the cover page or elsewhere in this decision will be redacted prior to posting on the website of the Office for Dispute Resolution as part of its obligation to make special education hearing officer decisions available to the public pursuant to 20 U.S.C. § 1415(h)(4)(A) and 34 C.F.R. § 300.513(d)(2).

<sup>2</sup> 20 U.S.C. §§ 1400-1482. The federal regulations implementing the IDEA are set forth in 34 C.F.R. §§ 300.1 – 300.818. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 14.101 – 14.163 (Chapter 14) 29 U.S.C. § 794. The federal regulations implementing Section 504 are codified in 34 C.F.R. §§ 104.1 – 104.61. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 15.1 – 15.11 (Chapter 15).

<sup>3</sup> "Parents" references both Parents, although one Parent, acting for both Parents, carried out communication with the District and presented the family's case at the due process hearing. "Parent" in the singular is used when it is clear that this one parent acted alone.

2. Through telephone conversation with the Parent, the District ascertained that the Parents' reasons for their request included concerns about Student's social, emotional and behavioral functioning as well as concerns about balance and pencil grip related to a diagnosis of cerebral palsy. [NT 18; S-3]
3. Through a Prior Written Notice (PWN) dated February 13, 2017 the District proposed the following assessment procedures: occupational therapy evaluation, physical therapy evaluation, standardized cognitive assessments, standardized academic assessments, social/emotional/behavioral assessments, classroom observation and parent/teacher input. [NT 19; S-3]
4. The Parents approved the PWN on February 14, 2017 and the District received it back on February 17, 2017. [NT 21; S-3]
5. The District conducted its evaluation in March and April 2017 and issued its Evaluation Report (ER) dated April 18, 2017. [NT 25-26; S-4]
6. Under Reasons for Referral the ER states: 'Parents requested a multidisciplinary evaluation due to concerns with social, emotional, and behavioral functioning. Parent expressed concerns with anxiety, perfectionism, mild cerebral palsy, ADHD, homework completion, rigidity, social concerns, and frustration tolerance. Additional concerns included balance, large motor coordination, fine motor skills and pencil grip. [NT 22; S-4]
7. Early background information relevant to the issues in this decision included delayed walking (2+ years), failure to develop age-appropriate social skills or interest in playing with others, easily distracted by own thoughts at times, very sensitive to sensory stimuli including loud noises, texture of clothing, and crowds of people. [S-4]
8. Student's older sibling is on the autism spectrum. At least one of the participants in the District's evaluation had direct knowledge that Student's older sibling has autism spectrum disorder. [NT 185]
9. Student received Early Intervention services from age 4 months to 3 years including speech therapy, occupational therapy, physical therapy and teacher support. [S-4]
10. The District evaluated Student as part of the transition from Early Intervention to school-age programming and found Student ineligible for special education services at that time. Student was exited from special education. [NT 24-25; S-1]
11. Through age 5 or 6 Student received individual psychotherapy, art therapy and group therapy from a private provider. Student currently receives individual psychotherapy and has lessons on a musical instrument with a music therapist. [NT 190; S-4]
12. Student is prescribed four psychotropic medications daily: two for focus and impulsivity, one for anxiety, and one for irritability and frustration. [NT 187]

13. Parents noted that socially Student has difficulty with new experiences, and people. Student displays “tremendous anxiety and constant worrying”. Student is very angry and gets angry very easily. Student “needs things to be just so”. Student has difficulty dealing with frustration. [S-4]
14. When agitated Student snaps Student’s fingers “constantly” to help calm down.<sup>4</sup> [NT 201]
15. At mid-elementary school age Student carries a plush stuffed animal wherever Student goes; Student considers the toy Student’s “best friend”. [NT 186]
16. Student loves taking care of younger children, and enjoys being with adults and can talk to them for hours. [NT 187]
17. For purposes of the District’s evaluation, Student’s psychiatrist and collaborating nurse practitioner provided a letter dated February 15, 2017. The letter, which is included verbatim in the ER, notes that Student was evaluated on November 4, 2015 and was diagnosed with a Mood Disorder, Not Otherwise Specified, an Anxiety Disorder Not Otherwise Specified, and with traits of an Autism Spectrum Disorder and Attention Deficit Hyperactivity Disorder, combined subtype. [NT 22; S-4]
18. The letter goes on to recount reports by the Parents that Student has long standing issues of rigidity and inflexibility, difficulty coping with unexpected changes or transitions, anxiety at night and various fears such as of new experiences and new situations. Student is anxious about the weather, bees and crowded situations. Student is a perfectionist. Student has sensory issues including how clothing feels. The letter noted that evaluations starting at age two and a half considered the diagnosis of an Autism Spectrum Disorder. [S-4]
19. The letter includes a telephone number and an invitation to call with any questions the evaluator might have.<sup>5</sup> [S-4]
20. Standardized cognitive testing yielded results in the very high average range overall. [NT 27-28; S-4]
21. Standardized achievement testing yielded results in the above average range overall, commensurate with cognitive ability. [NT 31-32; S-4]
22. The District psychologist observed Student at lunch and at recess for a total of about twenty-two minutes. At lunch Student sat at a table with “quiet” same-gender peers who were “not overly loud or expressive” but Student did smile and engage in some conversation. [NT 23. 53]

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<sup>4</sup> The Parent noted this in her closing statement but as she had been previously sworn I accept it as a finding of fact.

<sup>5</sup> The record is silent as to whether any of the District’s evaluators contacted the authors of the letter.

23. Teacher input included that earlier on in the school year when completing written work Student wanted to re-do assignments if Student noticed a small error in writing. Student would want to erase and re-do all the work. Additionally [at times] Student became overly anxious and cried, but then was able to use some coping strategies to calm down. [NT 71-72]
24. The District psychologist utilized the Behavior Assessment Scales for Children – Third Edition (BASC-3) to assess a “wide range of concerns related to social, emotional, and behavioral functioning”. This instrument is a rating scale on which individuals with knowledge of a child, and the child as well, consider an array of items describing behaviors and feelings and endorse relevant items. The BASC has gender-specific scoring criteria. [NT 35, 61; S-4]
25. The teacher’s endorsements yielded significantly elevated levels of anxiety as well as withdrawal and poor adaptability when required to change and deal with transitions. Teacher endorsements also resulted in at-risk concerns with depression, somatic complaints, school problems, attention problems, and functional communication. [NT 36; S-4]
26. Although the Parents’ responses revealed some similar areas of concern, they endorsed additional concerning behaviors. They endorsed significant levels of hyperactive and impulsive behaviors, and at-risk aggressive behaviors, atypical behaviors, and social skill functioning. [NT 36-37; S-4]
27. Student was not given the student version of the BASC, but was given another checklist-type instrument, the Revised Children’s Manifest Anxiety Scale – Second Edition (RCMAS -2). The RCMAS has gender-specific scoring criteria. [NT 37-38, 63; S-4]
28. The most concerning finding surfacing from Student’s endorsements on the Children’s Manifest Anxiety Scale was Student’s overall worry, revealing a variety of internalized obsessive-related concerns. Out of 16 items on the scale related to worry, Student endorsed 15. The District’s psychologist considered this piece of data to be significant. [NT 37; S-4]
29. The teacher and Parents were asked to complete the Connors-3, a rating scale that addresses characteristics of attention disorders. The Connors has gender-specific scoring criteria. [NT 38, 63; S-4]
30. On the teacher form the areas elevated most significantly were inattention and inattentive behaviors, as well as peer relations. [NT 39; S-4]
31. On the Parent form, in addition to the elevated inattentiveness and peer relations difficulties recognized by the teacher, the Parents also endorsed other concerning behaviors related to hyperactive and impulsive behaviors, as well as defiance and aggression. [NT 39; S-4]

32. At the Parents' request the District psychologist also utilized the Gilliam Autism Rating Scale – Third Edition. (GARS-3). The GARS does not have gender-specific scoring criteria. [NT 40, 62; S-4]
33. On the GARS teacher form, cognitive style was more elevated than other areas. The Parents reported more concerns in the home than the teacher reported for the school setting. [NT 40; S-4]
34. On the GARS the Parents noted: Student does not initiate conversation with others or peers, seems unwilling or reluctant to get others to interact, does not try to make friends, has difficulty understanding what causes others to dislike Student, needs an excessive amount of reassurance if things are changed or wrong, becomes frustrated quickly when Student cannot do something, has temper tantrums when not getting own way, becomes upset when routines are changed, reacts negatively when given commands, does certain things over repetitively, shows an unusual interest in sensory aspects of play materials, body parts or objects, and displays ritualistic or compulsive behaviors. [S-4]
35. The teacher's GARS results indicated that autism was "unlikely" whereas the Parents' results indicated that autism was "very likely". The teacher's score was 53 and the Parents' score was 72. Children with scores from 55 to 70 tend to be on the higher end of the autism spectrum. [NT 41, 64-65; S-4]
36. Due to the Parents' concerns about social difficulties and characteristics of autism the District psychologist used the Social Responsiveness Scale – Second Edition (SRS-2) which is a questionnaire designed to assess interpersonal behavior, communication and repetitive/stereotypic behaviors that may be characteristic of autism spectrum disorder. The SRS has gender-specific scoring criteria. [NT-41, 62; S-4]
37. The teacher's responses on the SRS yielded a Total Score of Moderate, and subpart scores as follows: Social Awareness - Typical, Social Cognition – Mild, Social Communication – Moderate, Social Motivation – Mild, Restricted Interests and Repetitive Behaviors – Moderate. [NT 41-42; S-4]
38. The Parents' responses on the SRS yielded a Total Score of Severe, and subpart scores as follows: Social Awareness - Typical, Social Cognition – Typical, Social Communication – Moderate, Social Motivation – Severe, Restricted Interests and Repetitive Behaviors – Severe. [NT 41-42; S-4]
39. Student was given a selected portion of the NEPSY-2, an instrument designed to assess neuropsychological development in children and adolescents. Student was required to detect the feeling associated with pictured faces, to make a judgment about what others might think based on verbally presented stories, and to select one of four pictures depicting the feelings of a target child in a pictured social situation. Student's Affect Recognition, Theory of Mind Verbal and Theory of Mind Total were all above the expected level<sup>6</sup>. [NT 42-43; S-4]

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<sup>6</sup> The "expected level" is between the 25<sup>th</sup> and the 75<sup>th</sup> percentile. [S-4]

40. The District psychologist concluded that the primary reason that Student has difficulties during the school day is due to the elevated levels of anxiety and the attention difficulties, and is not indicative of an autism spectrum disorder. [NT 46]
41. Anxiety can ‘absolutely’ be a part of an autism spectrum disorder diagnosis and is often comorbid with that diagnosis. [NT 51]

[Section Redacted.]

### Legal Basis

**Burden of Proof:** The burden of proof, generally, consists of two elements: the burden of production [which party presents its evidence first] and the burden of persuasion [which party’s evidence outweighs the other party’s evidence in the judgment of the fact finder, in this case the hearing officer]. In special education due process hearings, the burden of persuasion lies with the party asking for the hearing. If the parties provide evidence that is equally balanced, or in “equipoise”, then the party asking for the hearing cannot prevail, having failed to present weightier evidence than the other party. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006); *Ridley S.D. v. M.R.*, 680 F.3d 260 (3<sup>rd</sup> Cir. 2012). In this case the District asked for the hearing and thus assumed the burden of proof.

**Credibility:** During a due process hearing the hearing officer is charged with the responsibility of judging the credibility of witnesses, weighing evidence and, accordingly, rendering a decision incorporating findings of fact, discussion and conclusions of law. Hearing officers have the plenary responsibility to make “express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at \*28 (2003); The District Court "must accept the state agency's credibility determinations unless the non-testimonial extrinsic evidence in the record would justify a contrary conclusion." *D.K. v. Abington School District*, 696 F.3d 233, 243 (3d Cir. 2014); *see also generally David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009); *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 \*11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District*, 88 A.3d 256, 266 (Pa. Commw. 2014); *Rylan M. v Dover Area Sch. Dist.*, No. 1:16-CV-1260, 2017 U.S. Dist. LEXIS 70265 (M.D. Pa. May 9, 2017). I found the witnesses to be generally credible. Although I found the District’s psychologist’s cognitive and achievement testing results to be reliable, I did not find her interpretation of behavioral/social/emotional testing reliable on the issue of whether or not Student should properly be classified as autistic. There was no evidence that she seriously considered Student’s developmental and family history, the areas in the teacher’s and the Parents’ responses that supported a possible classification of autism as opposed to anxiety disorder, or the ways in which the genders manifest differently on the autistic spectrum.

**Independent Educational Evaluation:** Parental rights to an IEE at public expense are established by the IDEA and its implementing regulations: “A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by

the public agency...” 34 C.F.R. § 300.502(b)(1). “If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either – (i) File a due process complaint to request a hearing to show that its evaluation is appropriate; or (ii) Ensure that an independent educational evaluation is provided public expense.” 34 C.F.R. § 300.502(b)(2)(i)-(ii).

Standards for Evaluations: The purpose of an initial evaluation is to determine whether the child meets any of the criteria for identification as a “child with a disability” as that term is defined in 34 C.F.R. §300.8, as well as, if the child is found to be eligible, to provide a basis for the contents of the child’s IEP, including a determination of the extent to which the child can make appropriate progress “in the general education curriculum.” C.F.R. §§300.8, 300.304(b)(1)(i), (ii).

Generally the IDEA’s requirements for reevaluations are similar, although a reevaluation may not necessarily be as extensive as an initial evaluation.

The general standards for an appropriate evaluation/reevaluation are found at 34 C.F.R. §§300.304—300.306. The public agency is required to 1) “use a variety of assessment tools”; 2) “gather relevant functional, developmental and academic information about the child, including information from the parent”; 3) “Use technically sound instruments” to determine factors such as cognitive, behavioral, physical and developmental factors which contribute to the disability determination; 4) refrain from using “any single measure or assessment as the sole criterion” for a determination of disability or an appropriate program. C.F.R. §300.304(b)(1—3). In addition, the measures used for the evaluation must be valid, reliable and administered by trained personnel in accordance with the instructions provided for the assessments; must assess the child in all areas of suspected disability; must be “sufficiently comprehensive to identify all of the child’s special education and related service needs” and provide “relevant information that directly assists” in determining the child’s educational needs. 34 C.F.R. §§300.304(c)(1)(ii—iv), (2), (4), (6), (7). An initial evaluation must also include, if appropriate: 1) A review of existing evaluation data, if any; 2) local and state assessments; 3) classroom-based and teacher observations and assessments; 4) a determination of additional data necessary to determine whether the child has an IDEA-defined disability, the child’s educational needs, present levels of academic achievement and related developmental needs, whether the child needs specially-designed instruction and whether any modifications or additions to the special education program are needed to assure that the child can make appropriate progress and participate in the general curriculum. 34 C.F.R. §§300.305(a)(1),(2).

[Section Redacted.]

## Discussion

Before discussing the reasons for my findings it is important to understand that parental disagreement with an evaluation’s conclusions is not evidence that an evaluation is inappropriate; parental disagreement with supported conclusions is irrelevant to the inquiry. If this were not the case, parents could defeat any school district’s defense of its own evaluation by simply disagreeing with the outcome. Further, the inquiry is not even whether or not a hearing officer agrees with a school district’s evaluation results. Provided that a district conducted its

evaluation under IDEA standards and supported its conclusions with data derived from properly administered assessments the evaluation must be deemed appropriate. The inquiry when the hearing issue is an LEA's denial of a parental request for an independent educational evaluation at public expense is whether the LEA's evaluation met the standards for appropriateness set forth in the IDEA.

In challenging an evaluation, courts have found that a parent "cannot simply argue that the evaluation was inappropriate because they disagree with its findings. The key is in the methodology. The conclusions, or lack thereof, cannot be inadequate unless the methodology is inadequate, because that is the only provision in the law." *L.S. ex rel. K.S. v. Abington Sch. Dist.*, No. 06-5172, 2007 U.S. Dist. LEXIS 73047, 2007 WL 2851268, at \*12 (E.D. Pa. Sept. 28, 2007).

Autism Spectrum Disorder: The District attributes Student's difficulties in school to an anxiety disorder. While this is not an unreasonable hypothesis, it is notable as affirmed in the District psychologist's testimony, that children on the autism spectrum often have a comorbid diagnosis of anxiety.

I find that Student's early developmental and treatment history, the Parents' description of Student as put forth in the ER, Student's sibling having been diagnosed as being on the autism spectrum, and the letter from Student's treating/prescribing psychiatric team all provide compelling data to raise a suspicion of autism spectrum disorder.

Teacher responses on rating scales raise red flags: On the BASC, among other areas, the teacher's ratings resulted in clinically significant symptoms of withdrawal and poor adaptability when required to change and deal with transitions, and at-risk concerns with functional communication. On the teacher's Connors form, among the areas that came up as elevated most significantly was peer relations. The teacher's responses on the SRS yielded a Total Score of Moderate, with Social Communication and Restricted Interests and Repetitive Behaviors both being Moderate, and Social Cognition and Social Motivation both being Mild.

The Parents' responses to the BASC, the Connors and the SRS yielded concerns in some areas similar to those of the teacher's, but represented the enhanced picture that parents who see a child much more frequently can provide. On the BASC the Parents' responses yielded additional at-risk scores in aggressive behaviors, atypical behaviors, and social skill functioning. On the Connors the Parents' ratings included additional significant elevation on aggression and defiance. On the SRS the Parents' ratings reflected a Total Score of Severe, with Severe scores in Social Motivation and Restricted Interests and Behaviors and Moderate scores in Social Communication.

On the GARS, the teacher's and the Parents' outcomes were 'unlikely' versus 'very likely'. However, drilling down into the teacher's responses on the BASC, the Connors and the SRS, in addition to the Parents' response pattern on those instruments, I find that District tended to discount teacher findings that raised red flags around the question of autism spectrum disorder in favor of finding an anxiety disorder and tended not to give the Parents' input the weight it deserved in spite of the District psychologist's clear testimony that "anxiety can 'absolutely' be a part of an autism spectrum disorder diagnosis and is often comorbid with that diagnosis." Likewise I find that the District did not pay sufficient attention to Student's early personal

developmental history and to family history. I also note that although the psychologist was proficiently able to answer detailed questions about the testing instruments she administered, she could not recall any of the not-so-recent research that on the Autism Spectrum the genders present differently [NT 57, 60]<sup>7</sup>.

I find that the District did not adequately assess Student in all areas of suspected disability. Given the red flags that should have raised concerns about an autism spectrum disorder during the course of the evaluation, I find that the District should have further explored the presence of an autism spectrum disorder. The current “gold standard” for assessing the presence of an autism spectrum disorder is the ADOS-2. The District must fund an independent evaluation, the sole purpose of which will be to ascertain whether Student is on the autism spectrum and meets eligibility criteria for this classification under the IDEA.

[Section Redacted.]

### Order

It is hereby ordered that:

The District’s evaluation of Student in the area of autism spectrum disorder was inappropriate and therefore the District must fund an independent educational evaluation limited to ascertaining whether Student qualifies under the IDEA as a student with autism. The evaluation must be conducted by a certified school psychologist who is specifically trained and experienced in administering and interpreting the ADOS-2. The independent evaluator may utilize other additional methods including but not limited to parent and teacher interview, consult with Student’s psychiatrist, and/or survey forms needed to make an accurate and thorough assessment, but may not repeat the instruments the District has already administered.

[Redacted.]

Any claims not specifically addressed by this decision and order are denied and dismissed.

*Linda M. Valentini, Psy.D., CHO*

July 20, 2017

Linda M. Valentini, Psy.D., CHO  
Special Education Hearing Officer  
NAHO Certified Hearing Official

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<sup>7</sup> See, for example in the professional literature:

Tony Attwood – international expert on autism: [http://www.tonyattwood.com.au/index.php?Itemid=181&id=80:the-pattern-of-abilities-and-development-of-girls-with-aspergers-syndrome&option=com\\_content&view=article](http://www.tonyattwood.com.au/index.php?Itemid=181&id=80:the-pattern-of-abilities-and-development-of-girls-with-aspergers-syndrome&option=com_content&view=article);

See, for example in the popular press:

Scientific American: <https://www.scientificamerican.com/article/autism-it-s-different-in-girls/>

See, for example in the lay autism community:

Asperger Autism Network <http://www.aane.org/women-asperger-profiles>