

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF EDUCATION

In the Matter of:

[],

Student,

**FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER**

And

Independent School District 413
(Marshall Public Schools),

School District.

PROCEDURAL HISTORY

On March 13, 2014, the Minnesota Department of Education received a request for a due process hearing involving the Student and the School District. The Commissioner of Education assigned this matter to Administrative Law Judge (ALJ) James Mortenson on March 14, 2014.

Margaret O'Sullivan Kane, Kane Education Law, appeared on behalf of the Parents. Nancy E. Blumstein, Ratwik, Roszak & Maloney, P.A., appeared on behalf of the School District.

On March 17, 2014, the first prehearing order was issued scheduling the first prehearing conference. The first prehearing conference was held on March 21, 2014. A response to the Parents' complaint was filed on March 24, 2014. On March 25, 2014, the ALJ issued the second prehearing order which, among other things, clearly identified the issues for hearing and dismissed all claims not arising under the Individuals with Disabilities Education Improvement Act (IDEA).

On March 26, 2014, the parties convened for a resolution meeting. No agreements were reached.

On April 8 and April 9, 2014, the second prehearing conference was held. The third prehearing order was issued on April 11, 2014, which, among other things, set forth the rules for the hearing.

On April 16, 2014, the School District filed a motion in limine. On April 21, 2014, the Parents filed a response to the motion. An order on the motion was issued by the ALJ on May 1, 2014.

A third prehearing was held on April 22, 2014. A fourth prehearing order was issued on that date which granted an extension to the hearing decision deadline for good cause and rescheduled the due process hearing.

Prehearing disclosures were to be made by 4:30 p.m. on May 12, 2014, as well as the filing of a trial brief, pursuant to fourth prehearing order. The parties were also to prepare a joint exhibit book. These orders were not complied with. On May 13, 2014, the School District advised that it would object to any evidence not timely disclosed. On May 14, 2014, the ALJ advised the parties:

[d]ue to the time-sensitive nature of these proceedings, and due to the fact there has already been an extension of time granted, and as a matter of equity, I authorize you to agree and choose from two options: 1) Agree to waive the disclosure deadline, amending it to May 13, 2014; or 2) Begin the hearing on May 20, 2014 (which will ensure there have been five business days between the disclosure and the hearing). The latter option will result in one less day for hearing and I will deduct an equal amount of time for each party's case. So, if you select option 2, please plan accordingly in the presentation of your cases.

You are hereby directed to confer and make a determination and inform me of the determination no later than 4:30 p.m. on Thursday, May 15, 2014. If I have not heard from you, or you have not agreed, by that time, I will make the determination.

Later, on May 14, 2014, the ALJ was informed that the parties agreed to start the hearing a day late to accommodate the five day rule. The School District subsequently informed the ALJ, via letter dated May 16, 2014, that it objected to the ALJ's handling of the Parties' failure to adhere to the previously set rules.¹

The hearing was held over three days, beginning at 9:00 a.m. on Tuesday, May 20, 2014, at School District offices. The hearing was recessed approximately 6:30 p.m. and reconvened at 8:30 a.m. on Wednesday, May 21, 2014. The hearing recessed again at approximately 5:45 p.m., and reconvened for a final day at approximately 8:50 a.m., and ending about 3:00 p.m. on Thursday, May 22, 2014.

The Parent called four witnesses: [REDACTED], superintendent; [REDACTED], principal; the Student's Mother; and the Student's Father. The School District called six witnesses: [TEACHER 1], teacher; [TEACHER 2], teacher; [REDACTED], school psychologist; [TEACHER 3], teacher; [REDACTED], school nurse; and [REDACTED], other health disabilities consultant.

¹ The School District's letter characterizes the ALJ's management of the hearing process as interference in "its right to prohibit introduction of evidence." The School District also characterized the ALJ's management in this instance as "compell[ing] the School District to make a choice[.]" In fact, the ALJ did not require either party to make a choice, but rather offered them the opportunity to make an agreement and to avoid the ALJ making the determination for them. In this case, both parties failed to adhere to rules for disclosure. It would not have been fair to let this situation effectively end the matter through the prohibition of, potentially, all documentary evidence. This would have clearly been to the School District's benefit since the Parents brought the case. Finally, the ALJ's authority to manage the hearing process is broad, given the language of Minn. Stat. § 125A.091, subd. 18, and was handled in a manner balancing the rights of both parties.

Thirty-seven of the Parents' disclosed documents were entered into the record as exhibits (including one exhibit, P 53, that was not available until after the disclosure deadline and which the School District consented to admit). Ninety-nine of the School District's disclosed documents were entered into the record as exhibits.²

This decision is due no later than June 10, 2014. This decision is issued June 10, 2014.

STATEMENT OF THE ISSUES

1. Whether the School District failed to identify the Student as a possible child with a disability when it refused the Parents' requests for initial evaluation from [GRADE] until October 2013?

2. Whether the School District failed to ensure the initial evaluation of the Student in December 2013 was sufficiently comprehensive to identify all of the Student's special education and related service needs?

3. Whether the Student is a child with a disability under the definition of "[DISABILITY CATEGORY]" within Minnesota rules?

SUMMARY OF CONCLUSIONS

The School District failed to identify the Student as a possible child with a disability when concerns about Student's functional and academic performance arose beginning in [GRADE] and the School District's child find procedures were not followed.

The School District failed to ensure the initial evaluation of the Student in December 2013 was sufficiently comprehensive when it did not propose, conduct or otherwise obtain a medical assessment for diagnostic purposes related to the Student's physical conditions.

The Parents did not show the Student is a child with a disability under the definition of "[DISABILITY CATEGORY]" within Minnesota Rules.

Based on all the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT³

1. Student is [REDACTED]-year-old learner who attends an elementary school in the School District.⁴ [STUDENT] attended [GRADE] at the elementary during the 2013-2014 school year, the [GRADE] during the 2012-2013 school year, and [REDACTED] during the 2011-2012 school year.⁵

2. Student suffered from [ILLNESS] when [STUDENT] was a toddler.⁶ [STUDENT] underwent [MEDICAL TREATMENT].⁷ The [MEDICAL TREATMENT] was successfully

² For a list of exhibits, see Appendix A.

³ Information that may lead to the identification of the Student or Parents has been removed and placed in Appendix B, which is to be removed from the document before publication.

⁴ Exhibit (Ex.) P 14, Ex. P 53.

⁵ Ex. D 88, Ex. D 183, Ex. P 53.

⁶ Ex. P 1.

completed over the course of a year and Student has been [REDACTED] since the age of [REDACTED].⁸

[GRADE] (2011-2012)

3. [REDACTED].^{9 10}

4. Student was insecure, distracted, and anxious at school.¹¹ Student's teacher was concerned about the Student's receptive language because [STUDENT] "needs to hear all directions numerous times."¹²

5. Student's math and reading skills were moderately delayed, and Title I services were provided as an intervention which helped [STUDENT] catch up and exceed academic expectations over the course of the year.¹³

6. Student often went to the school nurse with health complaints, such as headaches or stomach aches, and rarely exhibited any outward signs of problems.¹⁴ This behavior was a manifestation of [STUDENT'S] [MEDICAL DIAGNOSIS #1].¹⁵

7. Student was absent a total of 34 days out of 175 (approximately 19 percent) of the school days during the 2011-2012 school year.¹⁶ Student's teacher was concerned about Student's absences.¹⁷

8. In March 2012, Student underwent a [PRIVATE] evaluation at the [LOCATION].¹⁸ The evaluation, not initiated by the School District, was to assess [STUDENT'S] neurobehavioral functioning in light of [STUDENT'S] struggles with [MEDICAL DIAGNOSIS #1].¹⁹ [STUDENT] was diagnosed with [MEDICAL DIAGNOSIS #1] by [PRIVATE EVALUATORS].²⁰ The evaluation report recommended, among other things, that the Student be provided an individual health plan (IHP) to address [STUDENT'S] [MEDICAL DIAGNOSIS #2], absences due to [MEDICAL ISSUES].²¹ The evaluation report does not otherwise diagnose, address, or mention [MEDICAL ISSUES].²² It was also recommended that criteria be established by the school, parents, and Student's physician to determine when [STUDENT]

⁷ *Id.*

⁸ Ex. P 1, Ex. P 2.

⁹ Ex. P1.

¹⁰ *Id.*

¹¹ Ex. P 1, Ex. D 53.

¹² *Id.*

¹³ Ex. D 89, Testimony (Test.) of [TEACHER 2] (Tr. 700).

¹⁴ Ex. D 53, Ex. D 57.

¹⁵ Ex. P 1.

¹⁶ Ex. D 88.

¹⁷ Test. [TEACHER 2] (Tr. 716).

¹⁸ Ex. P 1.

¹⁹ *Id.*

²⁰ Ex. P 1.

²¹ *Id.*

²² *Id.*

should miss school or engagement in certain activities at school should be limited.²³ [REPORT DETAILS].²⁴ The report also recommended addressing Student's [MEDICAL DIAGNOSIS #1] at school, possibly through a Section 504 plan.²⁵ The evaluation results, in redacted form, were provided to the School District on April 17, 2012.²⁶

9. An individualized Health Plan (IHP) was provided for Student by the School District on March 28, 2012.²⁷ The IHP addressed Student's [MEDICAL DIAGNOSIS #1] and stomach aches.²⁸

10. No request for special education services was made by Student's parents during the 2011-2012 school year.²⁹ Student's [GRADE] teacher never engaged the School District's child find procedures and the School District did not propose to conduct an initial evaluation during the 2011-2012 school year.³⁰

11. Student completed [STUDENT'S] [REDACTED] year with appropriate academic achievement.³¹

[GRADE] (2012-2013)

12. Student continued to frequent the school nurse's office in [GRADE].³²

13. The [GRADE] teacher was concerned about Student's confidence and was worried that Student had a difficult time believing in []self.³³ [PARENT ACCOMMODATIONS AND REACTIONS].^{34 35 36}

14. In September 2012, it was reported by [STUDENT'S] Pediatric Nurse Practitioner that Student "has developed some long term side effects from [STUDENT'S] [MEDICAL TREATMENT] which include [MEDICAL DIAGNOSIS #1], [OTHER MEDICAL ISSUES]."³⁷ While the [MEDICAL DIAGNOSIS #1] was diagnosed by [PRIVATE EVALUATORS], it is not

²³ *Id.* (Student's father testified that Student did not have a regular physician due to local physicians not being willing to work with them due to Student's prior [ILLNESS]. Student has been seeing a nurse practitioner or has been taken to the emergency room instead of seeing a regular physician. Tr. 566-67.)

²⁴ *Id.*

²⁵ *Id.*

²⁶ Ex. D. 64, Ex. D 65, Ex. P 1, Ex. D 81.

²⁷ Ex. D 73.

²⁸ *Id.* (The School District did not yet have the [PRIVATE] evaluation report, which stated that Student's [MEDICAL DIAGNOSIS #1] manifested in [OTHER MEDICAL ISSUES]. The report also advised that the best way to help Student with [STUDENT'S] [MEDICAL DIAGNOSIS #1] would be to "let [STUDENT] feel the [MEDICAL DIAGNOSIS #1]" and that "accommodating [STUDENT'S] [MEDICAL DIAGNOSIS #1] too much could unintentionally make [STUDENT'S] [MEDICAL DIAGNOSIS #1] worse[.]"

²⁹ Test. of [TEACHER 2] (Tr. 700).

³⁰ *Id.*

³¹ Ex. D 88, Test. of [TEACHER 2] (Tr. 706-07).

³² Ex. D 92, Ex. D 107, Ex. D 112.

³³ Test. of [TEACHER 1] (Tr. 588). ([TEACHER 1] also testified that Student had no unusual anxiety. This is not credible in light of the preponderance of evidence in the record, including the majority of the details of [TEACHER 1]'s testimony.)

³⁴ Test. Of [TEACHER 1] (Tr. 591), Ex. D97, Ex. D99, Ex. D101.

³⁵ *Id.*

³⁶ *Id.*

³⁷ Ex. P 2.

known who diagnosed the other ailments or determined they were the result of Student's [MEDICAL TREATMENT] as a toddler.³⁸

15. The Student continued to struggle with reading in [GRADE] and was again provided Title I services.³⁹ [STUDENT] made relatively good academic progress in the first half of the year, and less progress in the second half of the year.⁴⁰ By mid-year, the teacher was concerned that the Student was not on grade-level.⁴¹

16. Student's parents rejected the provision of an afterschool program for two afternoons per week (Project Success) that was proposed by the [GRADE] teacher to help Student with reading, math, and social skills.⁴²

17. The student continued to have attendance problems and missed 11 days the first half of the school year and 24 days the second half, for a total of 35 missed days of school.⁴³ The teacher and school nurse were concerned about Student's attendance, and the teacher advised the nurse that Student's lack of attendance was "definitely getting in the way of [STUDENT'S] success in [GRADE]."⁴⁴

18. The child find process was not initiated in [GRADE] for the Student. In January 2013, the [GRADE] teacher discussed her concerns about Student with the principal and school psychologist, inquiring whether a referral should be made to determine whether Student was eligible under the definition [DISABILITY CATEGORY].⁴⁵ A referral was determined to be "not appropriate" and was not made.⁴⁶

[GRADE] (2013-2014)

19. In a report of a physical examination of Student dated August 23, 2013, [STUDENT'S] nurse practitioner noted that [MEDICAL DIAGNOSIS #1] and [OTHER MEDICAL ISSUES] were "residual effect[s]" of the Student's [MEDICAL TREATMENT].⁴⁷

20. The Student began [GRADE] "pretty far behind in [STUDENT'S] reading abilities."⁴⁸ Despite this, [STUDENT'S] parents wanted to delay the provision of Title I services until the completion of the first quarter to see how [STUDENT] progressed without the services.⁴⁹ Interventions were continued, however.⁵⁰

21. On October 8, 2013, Student's parents requested a special education evaluation of Student.⁵¹ Some assessments were completed and a report by the School District, dated

³⁸ See e.g., Ex. P 1, Ex. P 2.

³⁹ Ex. D 95, Ex. D 185.

⁴⁰ Ex. D 113, Ex. D 150, Ex. D 183.

⁴¹ Test. of [TEACHER 1] (Tr. 600), Ex. D 146, Ex. D 149.

⁴² Test. of [TEACHER 1] (Tr. 586-87).

⁴³ Ex. D 183.

⁴⁴ Ex. D 119, Ex. D 146, Ex. D 149, Test. of [TEACHER 1] (Tr. 600).

⁴⁵ Ex. D 146.

⁴⁶ *Id.*

⁴⁷ P 3.

⁴⁸ Ex. D 199, Test. of [TEACHER 3] (Tr. 840, 842).

⁴⁹ Test. Father (Tr. 550), Test. [TEACHER 3] (Tr. 841), Ex. D 199.

⁵⁰ Ex. D 217, Ex. D 222.

⁵¹ Ex. D 217.

December 20, 2013, concluded without a team meeting that the Student “does not meet special education criteria and does not demonstrate a need for specialized instruction.”⁵² The report notes the Student’s excessive absences (34 days in [GRADE], 35 days in [GRADE], and 46 days to date in [GRADE]) but does not describe or analyze why the Student was missing so much school.⁵³ The report only specifies reading as Student’s “current school problem[.]”⁵⁴ The report states, without reference, that the reading problem “could be the result of high doses of medication while going through [MEDICAL TREATMENT].”⁵⁵ No medical assessment was conducted or obtained regarding Student’s health issues as part of the evaluation.⁵⁶ The criteria for specific learning disabilities were analyzed, but not the criteria for OHD.⁵⁷

22. By letter dated February 4, 2014, the school principal informed the Student’s parents that Student had missed 39 of 102 school days thus far and that attendance was important.⁵⁸ The letter advised Parents that “[i]f attendance is not possible due to a medical condition, please know that from this point forward we are requiring a signed doctors (*sic*) note stating that [Student] cannot attend school, the duration of the absence, and the reason for the absence.”⁵⁹

23. A meeting was held February 5, 2014, to discuss the special education evaluation report, discuss the IHP, discuss a recent request for a 504 evaluation, discuss absences and truancy, discuss an educational plan for partial school days, and discuss a communication plan.⁶⁰

24. A prior written notice of the refusal to determine Student eligibility for special education and related services was dated February 10, 2014.⁶¹ The notice explained that the refusal was because Student “did not meet eligibility criteria as documented in the Evaluation Report dated December 20, 2013.”⁶² The data used for the determination included: “review of [Student’s] school record, classroom observation, parent input, teacher input, review of group achievement scores, individually administered assessments and information gathered from outside sources by [Student’s] mother.”⁶³ The notice also advised that additional testing was considered and determined not necessary.⁶⁴

25. The IHP was revised and signed on February 13, 2014.⁶⁵ The IHP addressed the Student’s [MEDICAL DIAGNOSIS #2], [MEDICAL DIAGNOSIS #1], and [OTHER MEDICAL ISSUES].⁶⁶

⁵² *Id.* at p. 61.

⁵³ *Id.*

⁵⁴ *Id.* at p. 47.

⁵⁵ *Id.* (Where this supposition comes from is unknown. There are no records in evidence supporting that Student’s reading challenges were or could have been a direct result of [MEDICAL TREATMENT]. In fact, the medical records appear to rule this out.)

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Ex. D 302.

⁵⁹ *Id.*

⁶⁰ Ex. D 303, Ex. D 305.

⁶¹ Ex. D 309.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Ex. D 314.

26. The school principal sent Parents another letter expressing concern about Student's attendance, dated February 27, 2014.⁶⁷ The letter requests the opportunity to meet with the Student's primary health care providers to "answer questions that can substantiate the need for [Student's] absences as well as provide information regarding the necessity of a 504 plan and possible accommodations under that plan. . . ."⁶⁸

27. By March 2014, Student's mother was concerned about sending Student to school due to Student's [MEDICAL DIAGNOSIS #1].⁶⁹ The school principal advised Student's mother, consistent with prior recommendations from the [PRIVATE EVALUATORS], that "it is important to be strong with regard to [Student's] [MEDICAL DIAGNOSIS #1] [.]" and that Student should return to school.⁷⁰

28. Following the filing of the due process complaint in the present matter, the Student's Nurse Practitioner provided a letter dated March 31, 2014, stating that many of the Student's health issues, including [MEDICAL DIAGNOSIS #1] and various infections, are likely related to [STUDENT'S] [MEDICAL TREATMENT].⁷¹ This letter was subsequently signed by a medical doctor on April 11, 2014.⁷²

Based on the above Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. The Administrative Law Judge and the Commissioner of Education have jurisdiction in this matter.⁷³

2. The burden of proof is on the Parents, the party seeking relief.⁷⁴

3. Local standards, state statute, the rules of the Department, and federal law, provide the legal basis for this decision.⁷⁵

Identification/Child Find

4. Child find activities must include "[c]hildren who are suspected of being a child with a disability under [34 C.F.R.] § 300.8 and in need of special education, even though they are advancing from grade to grade[.]"⁷⁶ School districts have a continuing obligation under the IDEA and "to identify and evaluate all students who are *reasonably suspected* of having a

⁶⁶ *Id.* (The IHP notes that Parent advised the Student [OTHER MEDICAL ISSUES] due to past [MEDICAL TREATMENT]. However, no medical documentation of this is referenced and the medical records in this case do not reference such a condition. This is not a finding that the condition is not real. Rather, this is an example demonstrating the need for objective data.)

⁶⁷ Ex. D 329.

⁶⁸ *Id.*

⁶⁹ [REDACTED]

⁷⁰ *Id.*

⁷¹ Ex. P 49.

⁷² Ex. P 50.

⁷³ Minn. Stat. § 125A.091, subd. 12.

⁷⁴ Minn. Stat. § 125A.091, subd. 16.

⁷⁵ Minn. R. 3525.4420.

⁷⁶ 34 C.F.R. § 300.111(c)(2).

disability under the statutes.”⁷⁷ A school's failure to comply with Child Find may constitute a procedural violation of the IDEA.⁷⁸ Child Find does not demand that schools conduct a formal evaluation of every struggling student.⁷⁹ A school's failure to diagnose a disability at the earliest possible moment is not *per se* actionable, in part because some disabilities “are notoriously difficult to diagnose and even experts disagree about whether [some] should be considered a disability at all.”⁸⁰ Minnesota school districts must have a system in place to identify children with possible disabilities.⁸¹ Part of the School District’s child find process is as follows:⁸²

- 1) The student displays concerns;
- 2) Teacher is concerned with student academic progress or behavior;
- 3) Parent is contacted by the teacher for additional input/information sharing;
- 4) The teacher completes a “Teacher Request for Problem Solving Team Assistance Form”;
- 5) Concerns are brought up at Problem Solving Team meeting;
- 6) The Team investigates other avenues (family, child, medical, home, etc.);
- 7) A Problem Solving Team Problem Identification Screening Summary is completed;
- 8) Interventions are developed by the Team and teacher;
- 9) A Problem Solving Team Intervention Plan is completed;
- 10) Interventions are implemented and data collected by staff;
- 11) Results of interventions are shared with Problem Solving Team at least every two weeks. Results and next steps are discussed and evaluated;
- 12) If the data shows the student is making progress, interventions continue for at least seven weeks;
- 12a) If concerns are resolved, interventions have been successful and may or may not be necessary to continue.
- 12b) If concerns are not resolved, referral made for special education evaluation;

⁷⁷ *P.P. ex rel. Michael P. v. W. Chester Area Sch. Dist.*, 585 F.3d 727, 738 (3d Cir.2009) (emphasis added); accord 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111.

⁷⁸ *D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 249 (3d Cir. 2012).

⁷⁹ *Id.*, See, e.g., *J.S. v. Scarsdale Union Free Sch. Dist.*, 826 F. Supp. 2d 635, 661 (S.D.N.Y.2011) (“The IDEA’s child find provisions do not require district courts to evaluate as potentially ‘disabled’ any child who is having academic difficulties.”).

⁸⁰ *A.P. ex rel. Powers v. Woodstock Bd. of Educ.*, 572 F.Supp.2d 221, 226 (D.Conn.2008), *D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 249 (3d Cir. 2012).

⁸¹ Minn. R. 3525.0750.

⁸² School District Total Special Education System Plan (TSES), Appendix A #1. (Only the relevant portion of the comprehensive child find system is noted here.)

13) If the data does not show the student is making progress, new interventions are employed or current interventions are modified;

13a) New or modified interventions continue for at least seven weeks;

13b) If concerns are resolved, the new or modified interventions have been successful and may or may not be necessary to continue.

13c) If concerns are not resolved, referral made for special education evaluation.

5. Concerns about Student's reading and attendance were raised as early as [GRADE]. There were discussions between the teachers and parents about the Student's reading and attendance. No Teacher Request for Problem Solving Team Assistance Form was completed, however. In fact, Student's [GRADE] teacher had a discussion with the Principal and School Psychologist near the middle of the year and it was determined at that time that the teacher's concerns would not be forwarded to the Problem Solving Team.⁸³ Despite not following the child find procedures, interventions were employed beginning in [GRADE]. The Student demonstrated academic improvement in the area of reading, where [STUDENT] struggled. Simply addressing [STUDENT'S] academic performance did not address [STUDENT'S] lack of regular attendance, however. The Parents made their request for a special education evaluation in October 2013, during the Student's [GRADE] year. The initial evaluation was then initiated and a report was issued December 20, 2013, concluding Student was not eligible, even though the team, including the parents, had not yet met.

Evaluation and Eligibility

6. Minnesota law defines "child with a disability" as:

a child identified under federal and state special education law as deaf or hard of hearing, blind or visually impaired, deafblind, or having a speech or language impairment, a physical impairment, other health disability, developmental cognitive disability, an emotional or behavioral disorder, specific learning disability, autism spectrum disorder, traumatic brain injury, or severe multiple impairments, and who needs special education and related services, as determined by the rules of the commissioner.⁸⁴

...

A child with a short-term or temporary physical or emotional illness or disability, as determined by the rules of the commissioner, is not a child with a disability.⁸⁵

7. An evaluation of a child must be, among other things, "sufficiently comprehensive to identify all of the child's special education and related service needs, whether or not commonly linked to the disability category in which the child has been classified."⁸⁶ All sources of information for the evaluation must be documented and carefully considered.⁸⁷

⁸³ The evidence refers to this as the "child study team."

⁸⁴ Minn. Stat. § 125A.02, subd. 1.

⁸⁵ Minn. Stat. § 125A.02, subd. 2.

⁸⁶ 34 C.F.R. § 300.304(c)(6). See *also*, Minn. R. 3525.2710, subp. 3(C)(4) "the child is evaluated in all areas of suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities" and (5)

8. "Special education" means any specially designed instruction and related services to meet the unique cognitive, academic, communicative, social and emotional, motor ability, vocational, sensory, physical, or behavioral and functional needs of a pupil as stated in the IEP.⁸⁸ Special education includes "[i]nstruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings[.]"⁸⁹

9. Specially designed instruction "means adapting, as appropriate to the needs of an eligible child..., the content, methodology, or delivery of instruction – (i) To address the unique needs of the child that result from the child's disability; and (ii) To ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children."⁹⁰

10. Minnesota rules define and set criteria for other health disabilities.⁹¹

Subpart 1. Definition.

"Other health disability" means having limited strength, endurance, vitality, or alertness, including a heightened or diminished alertness to environmental stimuli, with respect to the educational environment that is due to a broad range of medically diagnosed chronic or acute health conditions that adversely affect a pupil's educational performance.

Subp. 2. Criteria.

The team shall determine that a pupil is eligible and in need of special education instruction and services if the pupil meets the criteria in items A and B.

A. There is:

(1) written and signed documentation by a licensed physician of a medically diagnosed chronic or acute health condition; or

(2) in the case of a diagnosis of Attention Deficit Disorder or Attention Deficit Hyperactivity Disorder (ADD or ADHD), there is written and signed documentation of a medical diagnosis by a licensed physician. The diagnosis of ADD or ADHD must include documentation that DSM-IV criteria in items A to E have been met. DSM-IV criteria documentation must be provided by either a licensed physician or a mental health or medical professional licensed to diagnose the condition.

For initial evaluation, all documentation must be dated within the previous 12 months.

"evaluation tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the pupil are provided[.]"

⁸⁷ 34 C.F.R. § 300.306(c), Minn. R. 3525.2710, subp. 5(A)(2).

⁸⁸ Minn. R. 3525.0210, subp. 42.

⁸⁹ 34 C.F.R. § 300.39(a)(1)(i).

⁹⁰ 34 C.F.R. § 300.39(b)(3).

⁹¹ Minn. R. 3525.1335.

B. In comparison with peers, the health condition adversely affects the pupil's ability to complete educational tasks within routine timelines as documented by three or more of the following:

- (1) excessive absenteeism linked to the health condition, for example, hospitalizations, medical treatments, surgeries, or illnesses;
- (2) specialized health care procedures that are necessary during the school day;
- (3) medications that adversely affect learning and functioning in terms of comprehension, memory, attention, or fatigue;
- (4) limited physical strength resulting in decreased capacity to perform school activities;
- (5) limited endurance resulting in decreased stamina and decreased ability to maintain performance;
- (6) heightened or diminished alertness resulting in impaired abilities, for example, prioritizing environmental stimuli; maintaining focus; or sustaining effort or accuracy;
- (7) impaired ability to manage and organize materials and complete classroom assignments within routine timelines; or
- (8) impaired ability to follow directions or initiate and complete a task.

Subp. 3. Evaluation.

The health condition results in a pattern of unsatisfactory educational progress as determined by a comprehensive evaluation documenting the required components of subpart 2, items A and B. The eligibility findings must be supported by current or existing data from items A to E:

- A. an individually administered, nationally normed standardized evaluation of the pupil's academic performance;
- B. documented, systematic interviews conducted by a licensed special education teacher with classroom teachers and the pupil's parent or guardian;
- C. one or more documented, systematic observations in the classroom or other learning environment by a licensed special education teacher;
- D. a review of the pupil's health history, including the verification of a medical diagnosis of a health condition; and
- E. records review.

The evaluation findings may include data from: an individually administered, nationally normed test of intellectual ability; an interview with the pupil; information from the school nurse or other individuals knowledgeable about the health condition of the pupil; standardized, nationally normed behavior rating

scales; gross and fine motor and sensory motor measures; communication measures; functional skills checklists; and environmental, socio-cultural, and ethnic information reviews.

11. The initial evaluation of the student was not sufficiently comprehensive to identify all of the child's special education and related service needs. The primary concern was Student's attendance. The question of why the Student was missing so much school was not addressed by the evaluation. The School District argues that it had no reason to suspect the Student's attendance was a function of a possible disability. The information available to the School District in October 2013 indicates otherwise. The [GRADE] teacher had seen the reports from the [PRIVATE EVALUATORS] in April 2012. The report from [PRIVATE EVALUATORS] specifically raised concerns about appropriate school absences, and all of [STUDENT'S] teachers were constantly concerned about the Student's attendance. Reading interventions were employed with mixed results as a result of staff concerns about the Student's reading performance.

12. The School District failed to conduct a comprehensive evaluation. It did not obtain, consider, and document medical information necessary to determine whether the Student may be eligible under the definition of [DISABILITY CATEGORY], or perform all of the other assessments necessary and examine the criteria for [DISABILITY CATEGORY]. Further, the School District made its eligibility determination outside of the required team process, including the parents. A report was generated in December 2013 that concluded the Student was not eligible, even though the team had not yet met. When the team met in February 2014 to discuss a variety of matters, the determination had already been made and was presented to the parents. They were not part of the discussion of eligibility. This was improper under the law.

13. Because of the lack of a comprehensive evaluation, it is not yet known whether or not Student's attendance is related to a disability. Without this knowledge it cannot be determined whether Student is eligible under IDEA because it is Student's attendance that is potentially [STUDENT'S] greatest impediment to access to the general education curriculum and [STUDENT'S] peers. If Student's failure to attend school regularly is the result of things not related to a disability, it must be addressed through other means. If Student's failure to regularly attend school is the result of a disability, and [STUDENT] requires instruction at home or in hospital, [STUDENT] will have a need for special education and may be eligible under the IDEA. A medical diagnostic assessment is necessary to determine or rule out whether the Student has a chronic or acute health condition that is resulting in frequent absences. This assessment must be completed and signed by a licensed physician, pursuant to Minn. R. 3525.1335. The current advice from the nurse practitioner and doctor only states that there is a "likely" relationship between Student's health issues and [STUDENT'S] [MEDICAL TREATMENT]. This is not sufficient under the law and must be more closely assessed, or a team override documented pursuant to Minn. R. 3525.1354. Once the necessary assessments are completed, including the medical assessment and there is objective data showing Student has a chronic or acute health condition, as opposed to a short-term or temporary physical or emotional illness or disability, an examination of the eight elements of the criteria of paragraph B under the rule must be discussed by an appropriately convened team of professionals and the parents to make an eligibility determination.⁹² Alternatively, a team override can be considered.

Based upon the foregoing Conclusions of Law, the Administrative Law Judge makes the following:

⁹² 34 C.F.R. § 300.306(a).

ORDER

1. The School District must provide for the independent verification of a medical diagnosis of a chronic or acute health condition and documented, systematic interviews conducted by an independent licensed special education teacher with Student's prior classroom teachers and Student's parents within 45 calendar days of the date of this order. Parents must consent to any additional assessments. If Parents refuse to consent, this remedy will be deemed waived and the School District will be deemed to have not violated its obligation under 34 C.F.R. § 300.111 and 34 C.F.R. §§ 300.301 through 300.311. The medical assessment must be completed or supervised by a licensed physician, and a written assessment report, signed by the licensed physician, provided to the team, including the parents. The team shall include appropriate district staff, parents, and independent individuals who conducted the assessments. An individual is "independent" if they are not an employee of the School District.

2. If the diagnostic medical assessment shows the Student has a chronic or acute health condition, the team must conduct a review of all of the eight elements under Minn. R. 3525.1335, subp. 2(B). The review must be documented with explanations of why the Student does or does not meet each of the elements. A team override may be considered and properly documented if the medical assessment is inconclusive and the team suspects the Student has a health condition that is resulting in a pattern of unsatisfactory educational progress.

3. If the team disagrees about the final outcome of the evaluation (e.g. whether the Student meets at least three of the elements or whether there should be a team override) such a dispute may be resolved through appropriate means, including a due process hearing.

4. If the team agrees the Student is eligible, an IEP team must be convened. Prior to the start of the 2014-2015 school year, an IEP would be developed to meet the Student's needs, particularly the provision of services when the Student cannot attend school as a result of a chronic or acute health condition.

5. If the team agrees the Student is not eligible, no further action is required under this Order. This has no bearing on the Student's eligibility or services under other laws or programs, including the IHP recommended by [PRIVATE EVALUATORS].

Dated: June 10, 2014

s/James R. Mortenson
JAMES R. MORTENSON
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. § 125A.091, subd. 24, and 34 C.F.R. § 300.516, a party may seek review of this decision in the Minnesota Court of Appeals or in United States District Court, consistent with federal law. A party must appeal to the Minnesota Court of Appeals within 60 days of receiving the hearing officer's decision.

MEMORANDUM

The student in this matter has experienced some academic issues with regard to [STUDENT'S] reading performance. These have been successfully addressed by the School District with various non-special education interventions. The primary concern, however, has

been the Student's attendance. [STUDENT'S] attendance problem likely contributed to [STUDENT'S] reading issues, and may significantly impact [STUDENT'S] academic and functional progress in the future if left unaddressed.

The question is how to address Student's attendance issues. The Parents are seeking, according to the testimony of the father, a plan to be in place for Student when [STUDENT] is not able to attend school. This is a reasonable request, when the Student has valid reasons for being absent, e.g. medical appointments and serious illness stemming from a disability. The parents have not shown, however, that this request must be met through special education services. This is due to the fact that the Student has not been properly evaluated.

In this case, the School District failed to conduct a comprehensive initial evaluation when it did not obtain or rule out a medical diagnosis of a chronic or acute medical condition. A review of the existing records may not be sufficient when there is a health issue and existing records lack the required information. Medical services for diagnostic or evaluation purposes are included in the list of possible related services under the IDEA. (See 34 C.F.R. § 300.34(a).) Therefore, if a diagnosis of a disability by a licensed physician is required and not part of the existing records, the School District must take steps to have that assessment done.

The School District also failed to ensure the criteria under the definition of [DISABILITY CATEGORY] were analyzed. While Student's absenteeism was mentioned in the evaluation report, the team did not discuss why it was or was not related to an acute or chronic medical condition. The report does not discuss whether Student's [MEDICAL DIAGNOSIS #2] (requiring a specialized health care procedure) might be related to a chronic or acute medical condition. The report fails to discuss whether any of the other criteria under the Minnesota definition of [DISABILITY CATEGORY] were or were not met. Again, all of these discussions may be premature until there is a current medical diagnosis, pursuant to state rule, of a chronic or acute medical condition. The evidence the School District presented at hearing about the eight criteria was superficial and some witnesses contradicted themselves. For example, Student's [GRADE] teacher testified that Student's [MEDICAL DIAGNOSIS #1] was normal for a [GRADE] grader and was not interfering with [STUDENT'S] learning.⁹³ Yet, as early as August 23, 2012, the teacher had noted that Student was leaving class to go to the nurse three times every day.⁹⁴ Student's [GRADE] teacher also testified that the Student was at times highly agitated and that agitation sometimes distracted [STUDENT] from school work.⁹⁵ The teacher advised [PRIVATE EVALUATORS] that Student "needs to hear all directions numerous times."⁹⁶ Yet the teacher also responded in the negative to all of the elements of the [DISABILITY CATEGORY] criteria while testifying.⁹⁷

If a proper assessment of chronic or acute medical conditions is completed, and chronic or acute medical conditions are ruled out, then further analysis under the rule will be unnecessary for IDEA purposes. If the assessment demonstrates Student has a chronic or acute medical condition, then the remaining eight factors under the [DISABILITY CATEGORY] rule must be analyzed to determine whether or not at least three of them are the result of the health condition and they adversely affect Student's ability to complete educational tasks within routine timelines. Alternatively, if the diagnosis is too difficult to establish, but the team believes

⁹³ Test. of [TEACHER 1] (Tr. 587-588).

⁹⁴ Ex. D. 92.

⁹⁵ Test. of [TEACHER 2] (Tr. 712).

⁹⁶ Ex. P 1.

⁹⁷ Test. of [TEACHER 2] (Tr. 704-706).

there is enough evidence that the Student's frequent illnesses are related to [STUDENT'S] [MEDICAL TREATMENT], a team override may be examined for eligibility. It may be determined, however, that the Student's absences are the result of parental anxiety. Student's mother frequently withheld the Student from school for relatively minor ailments, or without any specific explanation. It is true Student's parents have been genuinely worried about [STUDENT'S] health, given their shared history. This complex relationship between the child's health and parental anxieties must be more fully examined through the evaluation process. Thus, the appropriate remedy in this case is to require the completion of an independent comprehensive evaluation, as specified in the Order above.

Parents are seeking compensatory education for Student. Student has not been determined eligible for special education and related services under IDEA. Despite [STUDENT'S] setbacks in development and reading, Student has been involved in and made progress in the general education curriculum with Title I services at school. This progress cannot be confused with possible need for the delivery of instruction at home if [STUDENT] requires it due to a disability. (Special education includes modified delivery of instruction, including instruction at home.⁹⁸) However, the Student has not suffered a loss of educational benefit necessary for a compensatory education award.⁹⁹ Compensatory education is an equitable remedy that may be provided as relief in disputes under the IDEA.¹⁰⁰ If, in the hearing officer's broad discretion, compensatory education is warranted, "the inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place."¹⁰¹ Here, even if the Student were currently eligible under IDEA, [STUDENT'S] parents have not shown where [STUDENT] would have been, educationally, but for the alleged denial of FAPE. Thus, no award of compensatory education is warranted.

This determination in no way reflects on Student's eligibility and services under any other laws.

J. R. M.

⁹⁸ 34 C.F.R. § 300.39.

⁹⁹ See Minn. Stat. § 125A.091, subd. 21.

¹⁰⁰ *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15-16 (1993), *Miener v. Missouri*, 800 F.2d 749, 753 (8th Cir.1986), *See also, Reid ex rel, Reid v. District of Columbia*, 401 F.3rd 516, 522, (D.C. Cir. 2005), citing *G. ex rel. RG v. Fort Bragg Dependent Schs.*, 343 F.3d 295, 308 (4th Cir. 2003).

¹⁰¹ *Reid* at 524 (D.C. Cir. 2005).