

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

In the Matter of [] (Parent), on behalf of []
(Student),

vs.

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

Minneapolis Public Schools, Special School
District No. 1 (School District).

On March 24, 2014, Chief Administrative Law Judge Tammy L. Pust reassigned this matter to Administrative Law Judge James Mortenson, who now serves as the independent hearing officer in this matter.

The Student's parent, [PARENT], [REDACTED], appeared on behalf of herself and the Student. Laura Tubbs Booth, Booth & Lavorato, LLC, 10520 Wayzata Blvd., Suite 200, Minnetonka, Minnesota 55305, appeared on behalf of the Minneapolis Public School District, Special School District No. 001 (School District).

PROCEDURAL HISTORY

The complaint in this matter was filed on February 24, 2014. The complaint is the latest in a series of complaints filed between the Parent and the School District regarding the educational services provided to the Student.¹

A prehearing conference was held via telephone on March 3, 2014. A Prehearing Order followed on March 4, 2014.

¹ According to the records of the Office of Administrative Hearings, the Parent filed a first due process complaint against the Minneapolis District on December 17, 2009 [OAH 58-1300-21023-9], which matter was dismissed on March 9, 2010, upon the parties' agreement to a new IEP. The Parent filed a second complaint, on March 18, 2010 [also OAH 58-1300-21023-9], which was also dismissed prior to hearing on the parties' agreement that all underlying issues had been resolved. The Parent filed a third complaint on February 17, 2012 [OAH 15-1300-22639-9], only one day after the Student had returned from enrollment in a different district, which matter was dismissed days before the scheduled hearing in accordance with the Parent's request. Having left and returned, approximately a month after the Student had reenrolled in the Minneapolis District, on December 9, 2013, the Parent requested her fourth due process hearing [OAH Docket No. 1300-31169] but then withdrew the complaint such that the matter was dismissed, without prejudice, by Order dated January 16, 2014. A day later, the Parent filed a fifth complaint on January 15, 2014 [OAH Docket No. 1300-31236], and then sought to voluntarily withdraw it immediately prior to hearing. The matter was dismissed, with prejudice, by Order dated March 12, 2014. In the meantime, on February 4, 2014 the School District filed its own request for a due process hearing [OAH Docket No., [84-1300-31280], seeking to implement a change of educational placement, which matter was dismissed by Order dated March 10, 2014. Last, the Parent filed the present matter, her sixth request for a due process hearing, on February 24, 2014.

On March 6, 2014, the School District filed and served its response to the complaint along with a prior written notice. A resolution meeting was also held that day but did not result in a resolution of the complaint.

On March 10, 2014, Deputy Chief Judge O'Malley issued an order denying a request from the Parent that Chief Judge Pust be disqualified from hearing the case.

A second prehearing conference was held via telephone on March 11, 2014. A Second Prehearing Order resulting from the conference was issued on March 12, 2014. That order, among other determinations, clarified and limited the issues to be determined in the present case. The Parent filed a motion to reconsider the limitations on March 13, 2014. The motion was granted on March 14, 2014, and the parties were permitted to brief the issue. The Parent also filed another motion that Chief Judge Pust be disqualified based, in part, on the Second Prehearing Order. Deputy Chief Judge O'Malley denied this motion in an order dated March 20, 2014.

Both parties filed witness lists on March 14, 2014. Only the School District disclosed documents as proposed exhibits.

On March 18, 2014, the School District filed a memorandum in support of a motion to dismiss. The Parent did not file anything in addition to support the substance of her motion for reconsideration.

On March 19, 2014, the Parent left a voicemail message with the Office of Administrative Hearings (OAH) and the School District advising that she had filed a claim in federal court against both agencies due, in part, to Chief Judge Pust not being disqualified. As of March 21, 2014, the complaint had not been served on OAH. The Parent's message was treated as a motion for a stay of the proceedings.

On March 21, 2014, Chief Judge Pust issued an order denying the Parent's motions for reconsideration and to stay the proceedings. The order also denied the School District's motion to dismiss the Parent's Complaint in its entirety. Consistent with the March 12, 2014 order, this order reinstated the limitation of issues to be heard at hearing.

The matter convened for hearing on March 25, 2014, at 67 8th Avenue NE, Minneapolis, Minnesota.

The Parent called three witnesses: [REDACTED], Special Education Coordinator; herself (Parent); and [REDACTED], Special Education Teacher. The School District called two witnesses: [TEACHER 1]; and [TEACHER 2]. Ten of the School District's 73 disclosed documents were entered into the record. The list of exhibits is attached at Appendix A. The Parent did not disclose any documents or offer any exhibits.

The Parent claimed at hearing that she did not timely receive the School District's disclosures. The School District produced an affidavit of service demonstrating the documents were mailed to the Parent's current address on March 14, 2014, consistent with the directions of the Chief Administrative Law Judge.

The hearing record closed on April 14, 2014, following receipt of the School District's closing arguments. The Parent made her closing argument on the record at the hearing. The

Parent requested that the Student be provided an unspecified amount of compensatory education in the area of mathematics.

The due date for this decision is May 10, 2014. This decision is issued on May 1, 2014.

STATEMENT OF THE ISSUES

1. Whether the School District violated federal and state special education law related to the evaluation of the Student by having “wrongfully evaluated the student without the knowledge or consent of the [P]arent.”

2. Whether the School District violated federal and state special education law by failing to follow the Student’s individualized education program (IEP) and thereby failing to provide a free and appropriate public education to the Student:

- a. Failing to give the Student “more than one warning” before sending [STUDENT] out the classroom and referring [STUDENT] out of the class for improper purposes;
- b. Requiring the Student to attend a “regular education math” class rather than a special education math class; or
- c. Suspending the Student without consideration of [STUDENT’S] disability or IEP.

SUMMARY OF CONCLUSIONS

The School District did not violate federal and state special education law related to the evaluation of the Student.

The School District did not fail to give the Student more than one warning before removing [STUDENT] from the classroom or to consider [STUDENT’S] IEP when it suspended [STUDENT]. The School District did violate federal and state special education law by failing to implement the Student’s IEP when it did not place the Student in a small-group, special education classroom for math, thereby denying the Student a free appropriate public education (FAPE).

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

FINDINGS OF FACT²

1. The Student is a [REDACTED]-year-old learner who was most recently enrolled in the School District in the [REDACTED] grade at School A from November 4, 2013, until March 4, 2014.³ The Student came to the District from Neighboring District A and was removed by the Parent to another neighboring school district.⁴

² Information that may lead to the identification of the Student or Parent has been removed and placed in Appendix B, which is to be removed from the document before publication.

³ Testimony of Parent, Ex. 19, Ex. 32, Ex. 73.

⁴ Test. of Parent, Ex. 19, Ex. 32, Ex. 73.

2. The Student has [DISABILITY] which results in impulsive behavior.⁵ The Student has a good sense of humor and desires to do well in school.⁶ [STUDENT] has good academic skills but often fails to follow through on work, participate in class, or is disruptive and unavailable for learning.⁷ The Student may be out of [STUDENT'S] seat during class, show a low tolerance for emotional upsets, struggle with multi-step tasks, and lose track of assignments.⁸ [STUDENT] has been determined eligible for special education and related services under the definition of [DISABILITY CATEGORY].⁹

IEP Requirements

3. When the Student was enrolled in the School District for the 2013-2014 school year, [STUDENT] came with an IEP from Neighboring District A.¹⁰ The IEP was updated in November 2013.¹¹

IEP Goals

4. The annual academic and functional goals for the Student were:¹²
- a. To increase [STUDENT'S] ability to understand what [STUDENT] reads from an instructional level four to an instructional level five;
 - b. To increase [STUDENT'S] ability to represent real-world and mathematical situations using one- and two-step equations and to increase [STUDENT'S] ability to solve two-step equations with whole numbers, from a level of representing situations using one-step equations with 50% accuracy and solving one-step equations with 80% accuracy, to a level of representing situations using one- and two-step equations with 80% accuracy and solving two-step equations with 80% accuracy; and
 - c. To increase [STUDENT'S] time on task, compliance with adult directives, time spent in class, ability to self-advocate, instances of coming to class prepared, and percentage of work turned in complete and on time, from a level of being on task an average of 60% of the time, following directions 40% of the time, leaving class without permission many times per day and sometimes many times per class period, infrequently self-advocating, coming prepared to class 40% of the time, and turning in 70% of homework and classwork, to a level of meeting each objective 80% of the time.

⁵ Ex. 19, Ex. 32.

⁶ Ex. 19, Ex. 32.

⁷ Ex. 17, Ex. 19, Ex. 32.

⁸ Ex. 19, Ex. 32.

⁹ Ex. 19, Ex. 32.

¹⁰ Test. of Parent, Ex. 19.

¹¹ Ex. 32.

¹² Ex. 19, Ex. 32. (The goals did not change with the updated IEP, which became the new IEP approximately November 26, 2013.)

Special Education and Related Services

5. The special education and related services required by the IEP included the following:¹³

- a. Special education for mathematics, five times per week, initially for 271 minutes per week and changed to 225 minutes per week in November 2013;
- b. Special education for English, five times per week, for 271 minutes per week and changed to 225 minutes per week in November 2013; and
- c. Special education for social studies, five times per week, for 271 minutes per week, changed in November 2013 to special education for social studies and science, five times per week, for 375 minutes per week.

6. All special education instruction was to be provided in a small-group, special education classroom, specifically replacing large-group general education classes.¹⁴ According to the IEP, the Student “benefits from the attention given to [STUDENT] in a small group with specialized instruction and reduced homework that meets [STUDENT’S] academic and behavioral needs.”¹⁵ Additionally, the Student was to be placed with general education students in physical education, lunch, and two elective classes.¹⁶ “[STUDENT] will have access to the special education resource room for behavior processing and academic support.”¹⁷

Supplementary Aids and Services

7. The IEP required the use of a behavior intervention plan (BIP). The BIP required, among other things, the provision of reminder cues, prompts, and redirection as needed to re-focus the Student, including providing three reminders prior to sending the Student out of the classroom.¹⁸ The BIP also required that for office referrals the Parent would be notified and that the Student’s disability “will be taken into consideration before any administrative action taken and special education teacher will be consulted to advocate for the Student.”¹⁹

Implementation of the IEP

Math Class

8. The Student was placed in a math class that included approximately 30 students, 10 of which were children with disabilities.²⁰ The class was co-taught with [TEACHER 1] providing content instruction and [SPECIAL EDUCATION TEACHER] providing specialized instruction.²¹ The Student had a separate “Foundations” class where [STUDENT] was

¹³ Ex. 19, Ex. 32.

¹⁴ Ex. 19, Ex. 32.

¹⁵ Ex. 19, Ex. 32.

¹⁶ Ex. 19, Ex. 32.

¹⁷ Ex. 19, Ex. 32.

¹⁸ Ex. 17, Ex. 19.

¹⁹ Ex. 17.

²⁰ Test. of [TEACHER 1], Test. of [SPECIAL EDUCATION TEACHER], Test. of [SPECIAL EDUCATION COORDINATOR].

²¹ Test. of [TEACHER 1], Test. of [SPECIAL EDUCATION TEACHER], Test. of [SPECIAL EDUCATION COORDINATOR].

supported primarily with science and social studies work, and with [STUDENT'S] behavior needs in general.²²

9. Staff believed that the Student required a more restrictive setting, but the Parent objected because she did not like the [NAME] Program within which the District planned to place the Student.²³ [REDACTED]²⁴

10. The other options the School District proposed were both located at School A. They were the co-taught math class within which the Student was placed, or a special education class with approximately twenty students and only one teacher.²⁵ The Parent rejected the special education class with one teacher due to the limited adult supervision available.²⁶

11. Since the Student had been originally placed in the large co-taught math class, the School District attempted to move the Student by requesting a due process hearing. That hearing request was dismissed after the Parent withdrew the Student from the School District.²⁷

12. The Parent believes the School District's attempts to move the Student to a more restrictive setting than [STUDENT] was in (despite her complaint that the IEP was not being implemented due to the math class [STUDENT] was in) was in retaliation for her advocacy on behalf of the Student.²⁸

Discipline

13. When the Student was disruptive in class [STUDENT] was redirected multiple times prior to being removed from the classroom, or being permitted to take a break using a "pass" [STUDENT] was provided.²⁹

14. The Student was suspended [#] times. [SUSPENSION DETAILS].^{30 31 32}

15. Multiple special education staff were involved in the determinations to suspend the Student.³³

Educational Benefit

16. At the end of the first reporting period for the Student, the end of the second quarter in December 2013, the Student had been in school less than a month and was earning

²² Test. of [SPECIAL EDUCATION COORDINATOR], Ex. 32.

²³ Test. of Parent, Test. of [TEACHER 1], Test. of [SPECIAL EDUCATION COORDINATOR], Test. of [SPECIAL EDUCATION TEACHER].

²⁴ Test. of Parent.

²⁵ Test. of [SPECIAL EDUCATION COORDINATOR].

²⁶ Test. of Parent, Test. of [SPECIAL EDUCATION COORDINATOR].

²⁷ OAH Docket No. 84-1300-31280. (School District's request for hearing to change Student's placement from a Federal Level Setting II to Federal Level Setting III, dismissed once the Parent removed the Student from the School District.)

²⁸ Test. of Parent.

²⁹ Test. of [TEACHER 1], Test. of [TEACHER 2], Test. of [SPECIAL EDUCATION COORDINATOR], Ex.

73.

³⁰ Ex. 37, Ex. 73.

³¹ Ex. 73.

³² Ex. 73. (The Parent also believes this suspension was in retaliation for her advocacy.)

³³ Test. of [SPECIAL EDUCATION COORDINATOR].

mostly failing grades in math.³⁴ It is unknown what the Student's academic performance in math was at the time [STUDENT] left the District on March 4, 2014, or any time after January 15, 2014. The Parent claims [STUDENT] is doing very well at [STUDENT'S] new school.³⁵

17. No evidence of the Student's progress (or lack thereof) toward [STUDENT'S] academic goal in math was presented.

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 pursuant to Minn. Stat. § 125A.091, subd. 12.

2. The burden of proof is on the Parent.³⁶ The Parent met her burden of proof that the School District did not provide the Student with special education services in conformity with [STUDENT'S] IEP with regard to the Student's math class. The Parent did not meet her burden of proof that there was a failure to implement the IEP regarding discipline, that there was a violation regarding reevaluation of the Student, or that the Student is entitled to compensatory education for the failure to implement the IEP.

3. Parental consent is required prior to the reevaluation of a student.³⁷ No evidence was presented that the Student was evaluated by the School District between [STUDENT'S] enrollment in November 2013 and March 4, 2014, when [STUDENT] left the District.

4. The provision of a FAPE requires, in part, that special education and related services be provided in conformity with the child's IEP.³⁸ The IDEA is violated when a school district deviates materially from a student's IEP.³⁹ The materiality standard does not require that the child suffer demonstrable educational harm in order to prevail on a failure-to-implement claim.⁴⁰ Rather, courts applying the materiality standard have focused on the proportion of services mandated to those actually provided, and the goal and import (as articulated in the IEP) of the specific service that was withheld.⁴¹

³⁴ Ex. 36, Test. of Parent.

³⁵ Test. of Parent, 1. (The Parent claimed the Student was failing math when she removed [STUDENT] and that [STUDENT] was doing very well at [STUDENT'S] new school. No corroborating evidence of the Student's educational performance in math at the time [STUDENT] left the School District in March 2014 was provided, however, and because academic performance and progress toward goals is typically documented, testimony as to performance is given little weight without corroborating evidence.)

³⁶ Minn. Stat. § 125A.091, subd. 16., *Schaffer v. Weast*, 546 U.S. 49 (2005).

³⁷ 34 C.F.R. § 300.300(c).

³⁸ 34 C.F.R. § 300.17(d).

³⁹ *Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811, 822 (9th Cir. 2007) (“[A] material failure to implement an IEP violates the IDEA. A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child's IEP.”)

⁴⁰ *Van Duyn*, 502 F.3d at 822; cf. *MM ex rel. DM v. Sch. Dist. of Greenville Cnty.*, 303 F.3d 523, 537 n.17 (4th Cir. 2002) (rejecting the argument that parents must show actual developmental regression before their child is entitled to ESY services under the IDEA).

⁴¹ *Id.*

5. The Student's IEP required [STUDENT] to be placed for math "instruction in a small-group, special education classroom." The School District placed the Student in a large-group general education math class that was co-taught by a special education teacher and regular education teacher. This was a failure to implement the IEP as written, and it existed the entire time the Student was enrolled in the School District during the 2013-2014 school year.

6. "The hearing officer may require the resident or responsible district to provide compensatory educational services to the child if the hearing officer finds that the district has not offered or made available to the child a free appropriate public education in the least restrictive environment and the child suffered a loss of educational benefit."⁴² The Parent in this case did not demonstrate that the Student suffered a loss of educational benefit as a result of the failure to implement the IEP. Thus, no compensatory education is warranted in this case.

ORDER

The School District denied the Student a FAPE when it failed to provide special education services in conformity with [STUDENT'S] IEP. Because the Student did not suffer a loss of educational benefit, no compensatory education is warranted. The Complaint is hereby **DISMISSED** with prejudice.

Dated: May 1, 2014

s/James 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.

MEMORANDUM⁴³

The Student is currently a [REDACTED]-year-old [REDACTED]-grader. [STUDENT] resides within the boundaries of the Minneapolis District. [STUDENT] is diagnosed with [DISABILITY], and qualifies for services under the [DISABILITY CATEGORY] category. [STUDENT] only attended school in the Minneapolis District from November 4, 2013, until March 4, 2014.

This decision is issued in the context of a lengthy and complicated relationship between the School District and the Parent. In its simplest terms, the Parent's viable claim of failure to implement the IEP regarding the Student's math class stems from her own objection to the placement the Student's IEP required. The School District failed to revise the IEP to require or permit the Student's placement in a large co-taught math class. Since the IEP controls, the failure of the School District to follow it as written constitutes a denial of FAPE to the Student in this case.

⁴² Minn. Stat. § 125A.091, subd. 21.

⁴³ This case involves a lengthy procedural context that is reported in prior decisions and will not be repeated here.

A school district is not to be held liable for such a denial where the parents have contributed to the problem and have, in fact, remedied the problem. Here, it was the Parent who tacitly agreed to the less restrictive setting, even though that setting was not reflected in the IEP. The Parent rejected the pull-out special education math class because it had a higher student to teacher ratio than the co-taught math class. A more segregated math class could have been provided in another school through the [NAME] Program, but the Parent also objected to that. With the Parent apparently standing in the way, the School District left the Student in the co-taught math class, in violation of the clear language of the IEP.

This was a material deviation from the IEP. The IEP required a small special education class room rather than a large-group general education classroom, for math. This was to ensure the Student would have the necessary attention, specialized instruction, and reduced homework to meet [STUDENT'S] needs. Placement in the larger classroom, even with a lower student-to-teacher ratio, was not consistent with these specific requirements.

The Parent requested compensatory education as a remedy for the denial of FAPE stemming from the failure to implement the IEP with regard to the math class. In addition to blocking the School District's attempts to move the Student into a setting consistent with the IEP, the Parent did not show any meaningful evidence that the Student suffered any loss of educational benefit as a result of the failure to implement the IEP. Indeed, federal law does not require harm to prevail on a failure to implement claim.⁴⁴ However, Minnesota law specifically requires harm before compensatory education is awarded.⁴⁵ Since harm was not shown, compensatory education cannot be awarded.

Finally, if there were any loss of educational benefit as a result of the School District's denial of FAPE, the Parent apparently remedied it when she placed the Student in the new school district. She claims the Student is doing well there. Thus, there is no concern about a continued denial of FAPE as a result of a failure to implement the IEP with regard to the math class as the Student is, apparently, involved in and making progress in the general education curriculum and progressing toward [STUDENT'S] IEP goals.

The Parent failed to show any other violations with regard to evaluation and implementation of the BIP. Those matters are dismissed with prejudice as well.

J. R. M.

⁴⁴ *Van Duyn*, 502 F.3d at 822; *cf. MM ex rel. DM v. Sch. Dist. of Greenville Cnty.*, 303 F.3d 523, 537 n.17 (4th Cir. 2002) (rejecting the argument that parents must show actual developmental regression before their child is entitled to ESY services under the IDEA).

⁴⁵ Minn. Stat. § 125A.091, subd. 21.