

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

B.S. v. Anoka Hennepin Public Schools,
Independent School District No. 11

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

This matter came before Administrative Law Judge Eric L. Lipman for an evidentiary hearing on August 6, 7 and 8, 2013, at the District's Staff Development Center in Anoka, Minnesota.

Margaret O'Sullivan Kane, Kane Education Law, LLC, appeared on behalf of **[NAME REDACTED]** (the Student). Tim R. Palmatier, Kennedy & Graven, Chartered, appeared on behalf of the Anoka Hennepin Public Schools, Independent School District No. 11 (the District).

Prior to the start of the evidentiary hearing, the parties arrived at a settlement of the claims for prospective relief. Accordingly, following that agreement, the remaining issues related to the propriety of an award of compensatory education services.¹

The hearing record closed following the receipt of the parties' post-hearing briefs on Friday, August 30, 2013. For good cause shown, the due date for this decision was extended until September 20, 2013.²

STATEMENT OF THE ISSUES

1. Did the District fail to properly identify the Student as having a Specific Learning Disability (SLD)?
2. Did the District fail to include a statement of measurable annual goals, including benchmarks or short-term objectives, related to the Student's needs, in his Individualized Education Plan (IEP)?
3. Did the District fail to accurately measure the progress towards annual goals and report on this progress?

¹ HEARING TRANSCRIPT, at 45 - 53.

² Minn. Stat. § 125A.091, subds.18 (c) and 20; HEARING TRANSCRIPT, at 788-95.

4. Did the actions of the District deny the Student a free appropriate public education (FAPE)?

SUMMARY OF CONCLUSIONS

The Administrative Law Judge concludes that the Parent and the Student have not established that the District failed to identify **[NAME REDACTED]** as a pupil with a Specific Learning Disability. Additionally, while there were shortcomings in the documentation of the interventions and services provided to **[NAME REDACTED]**, these shortcomings do not establish that **[NAME REDACTED]** was denied a free appropriate public education.

Based upon the contents of the hearing record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. **[NAME REDACTED]** is a 16-year-old student at **[NAME REDACTED]** High School (“**[HS]**”). **[NAME REDACTED]** lives in **[CITY REDACTED]**, Minnesota, with his parents and younger brother, **[NAME REDACTED]**.³

2. **[NAME REDACTED]** has Attention Deficit Hyperactivity Disorder (ADHD) – a disability that impacts his ability to focus on school work and learn.⁴

Initial Evaluation

3. In 2009, while **[NAME REDACTED]** was in sixth grade, the District conducted an initial special education evaluation. The District determined that **[NAME REDACTED]** was eligible for services under the category of “Other Health Disabled” (OHD).⁵

4. The “Learner Based Needs” identified in this evaluation included: (1) support in all academic areas to bring his functioning up to grade level; (2) needs to increase his rate of timely independent work completion; (3) needs to be held accountable for doing his own work in order to avoid being dependent on others; (4) needs to develop more sophisticated organizational strategies; and (5) needs to increase his attention to task.⁶

5. The evaluation summary also noted that “motivational factors” may be impacting **[NAME REDACTED]**’s performance in school. The evaluators expressed concern that the Student was potentially acquiring “a coping strategy of learned helplessness” and that “[h]is teachers and mother are working far harder than he is to

³ Ex. 18 at AH 102; Ex. 33 at 183.

⁴ Exs. 2 at AH 17 and 18; Ex. 33 at AH 186; Ex. 116 at 66-67.

⁵ Exs. 2; HEARING TRANSCRIPT, at 636 and 727.

⁶ Ex. 2 at AH 21.

accomplish his academic tasks.” Additionally, the evaluation indicated that, “his teachers and his parent may need to gauge whether **[NAME REDACTED]** doesn’t do the work or if he can’t do the work. If they suspect that it may be the former, he needs increased accountability for independent work completion.”⁷

6. The evaluation team likewise concluded that while **[NAME REDACTED]** did have “deficits in several areas of information processing,” he did not meet the eligibility criteria for a Specific Learning Disability.⁸

2010 - 2011 School Year: Eighth Grade IEP and Student Performance

7. During eighth and ninth grades, **[NAME REDACTED]** received special education services under an IEP that was effective on February 21, 2011.⁹

8. The Student’s eighth grade IEP included direct instruction, goals and objectives that addressed: work completion; on-task behavior; reading skills; and, written language skills.¹⁰

9. During eighth grade, **[NAME REDACTED]** received daily direct instruction in organizational strategies. **[NAME REDACTED]** was enrolled in an Organizational Strategies class that met for one class period every day and provided instruction in test taking strategies, assignment completion, chunking of information and organization.¹¹

10. The Organization Strategies class, like the remainder of **[NAME REDACTED]**’s eighth grade coursework, concluded on June 9, 2011.¹²

2011 - 2012 School Year: Ninth Grade IEP and Student Performance

11. When the Student transferred to **[NAME REDACTED]** High School (**[HS]**) he received direct instruction and support to address his reading and written language goals through his Essential English class. His Essential English was a class for students receiving special education services.¹³

12. At **[HS]**, **[NAME REDACTED]** likewise received direct instruction and support to address his deficits in maintaining organization and completing assignments. For example, the Student’s case manager **[NAME REDACTED]**, would meet with the Student each school day to discuss the Student’s workload. During these sessions – which occurred both inside and outside of the Student’s regular classroom – **[CASE**

⁷ *Id.*

⁸ *Id.* at AH 18 and AH 20.

⁹ Exs. 10 and 61; HEARING TRANSCRIPT, at 362-63 and 366-68.

¹⁰ Ex. 61.

¹¹ Ex. 10, at AH 87.

¹² Ex. 10 at AH 86-87; HEARING TRANSCRIPT, at 643-44.

¹³ HEARING TRANSCRIPT, at 588-87 and 647.

MANAGER NAME REDACTED] would review and model organizational strategies for completing school work. Additionally, **[CASE MANAGER NAME REDACTED]** would detail other available resources, such as having support staff read tests to the Student.¹⁴

13. During ninth grade, **[NAME REDACTED]** had a significant history of school discipline. **[NAME REDACTED]** was tardy to class – frequently skipping the classroom session altogether. More troubling still, in **[MONTH REDACTED]** of 2011, **[NAME REDACTED]** and another student were involved in a fist fight in a **[LOCATION REDACTED]** that resulted in **[NAME REDACTED]** later being hospitalized.¹⁵

14. In his first trimester of ninth grade, **[NAME REDACTED]** failed 4 of 5 classes, and earned a “D” in the remaining class.¹⁶

15. **[NAME REDACTED]**'s performance did improve, slightly, during his second trimester of ninth grade. He failed two of 5 classes and earned D grades in the remaining subjects.¹⁷

16. In February of 2012, the District completed a “three year” reevaluation of **[NAME REDACTED]**.¹⁸

17. The evaluation indicated that **[NAME REDACTED]** continued to qualify for special education services under the category of OHD:

[NAME REDACTED]'s academic skills and his abilities to apply them are in the average range for his age. His fluency with academic tasks is within the very low range. When compared to others at his age level, **[NAME REDACTED]**'s scores are average in broad reading and broad mathematics. His standard scores are low average (compared to age peers) in math calculation skills, and broad written language.¹⁹

18. The evaluation likewise concluded that the Student's “Learner Based Needs” centered around productively engaging with school work:

[The Student] needs to improve academic engagement by remaining awake and alert in class, by coming to class with necessary material, by

¹⁴ HEARING TRANSCRIPT, at 441, 640-41 and 687-88.

¹⁵ Exs. 35 and 41; see also, Ex. 18, at AH 107 and 114; HEARING TRANSCRIPT, at 401-03, 408, 614-15, 620, 634-35 and 655-56.

¹⁶ Ex. 62.

¹⁷ *Id.*

¹⁸ Ex. 18; HEARING TRANSCRIPT, at 380; see generally, Minn. R. 3525.2710, subp. 2 (“A district shall ensure that a reevaluation of each pupil is conducted if conditions warrant a reevaluation or if the pupil's parent or teacher requests a reevaluation, but at least once every three years ...”).

¹⁹ Ex. 18, at AH 114; see also, Ex. 18, at AH 115; HEARING TRANSCRIPT, at 673 and 727.

learning strategies for planning and managing workload, and “by avoiding distractions”; “needs to improve his rate of work that is completed on time and to expectations”; “needs to work on developing skills to enable him to complete tasks that are of low personal priority”; “needs to continue to work on his ability to finish assignments. . .”; and “needs to continue to develop work skills including initiating tasks, maintaining a productive work rate and completing tasks in a timely manner as well as job seeking skills and positive interpersonal skills.”²⁰

19. The results of the evaluation did not support a conclusion that **[NAME REDACTED]** possessed a specific learning disability with written language or any other area.²¹

20. On March 26, 2012, the IEP team met to discuss the results of the evaluation and to make needed revisions to the IEP. The Parents attended and participated in the team meeting.²²

21. The Parents expressed their agreement with the conclusions of the evaluation.²³

22. After the March 26, 2012 IEP team meeting, the team developed a new IEP for the Student.²⁴

23. The revised IEP included a series of important accommodations, including:

- (a) shortened assignments;
- (b) the option of pass-fail grading;
- (c) modified tests;
- (d) retesting for test scores lower than 70 percent, if the Student had completed all assignments;
- (e) reading of tests aloud to the Student;

²⁰ Ex. 18, at AH 115.

²¹ HEARING TRANSCRIPT, at 775-76; see *generally*, Minn. R. 3525.1341, subp. 1 (“‘Specific learning disability’ means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia”).

²² Exs. 18 and 20; HEARING TRANSCRIPT, at 665-68.

²³ Ex. 18, at AH 118; HEARING TRANSCRIPT, at 665-66.

²⁴ Ex. 23.

- (f) added time to complete tests; and,
- (g) extended school year services, so as to permit the Student to recover credits for classes that he failed during ninth grade.²⁵

24. The Parents consented to the proposed IEP on March 28, 2012.²⁶

25. During the final trimester of ninth grade, **[NAME REDACTED]** earned the grade of “C-” or better in all of his courses, except physical education – which he earned an “F.”²⁷

26. **[NAME REDACTED]** enrolled in and attended the Extended School Year “credit recovery program” (ESY), in an effort to earn replacement credits for classes in which he had earlier-received failing grades. Yet, early on in the program, **[NAME REDACTED]** was suspended for misconduct. On June 26, 2012, **[NAME REDACTED]** was caught **[INFRACTION REDACTED]** from a peer at school. Following his 3-day suspension, **[NAME REDACTED]** did not return to ESY classes.²⁸

27. As a result, **[NAME REDACTED]** did not recover earn any replacement credits through the summer credit recovery program.²⁹

2012 - 2013 School Year: Tenth Grade IEP and Student Performance

28. An IEP meeting was held on September 28, 2012, shortly after **[NAME REDACTED]** began his studies in tenth grade.³⁰

29. The revised IEP provided that **[NAME REDACTED]**’s deficits in organization and work completion would be addressed through an Essential Study Skills class, daily assistance and instruction from his case manager and staff support in his general education classes.³¹

30. During tenth grade, **[NAME REDACTED]** did, in fact, receive significant supports to address his deficits in organization and work completion. He received assistance in recording assignments; managing time; note-taking; test-taking strategies and breaking assignments into manageable parts. Additionally, **[NAME REDACTED]**

²⁵ Ex. 23, at AH 141-42; HEARING TRANSCRIPT, at 674-75.

²⁶ Exs. 22; HEARING TRANSCRIPT, at 669-72.

²⁷ Ex. 62.

²⁸ Ex. 41, at AH 264; HEARING TRANSCRIPT, at 675.

²⁹ HEARING TRANSCRIPT, at 675.

³⁰ Ex. 30 at AH 161; Ex. 42 at AH 305.

³¹ Ex. 30 at AH 163 and 170-71; Ex. 42 at AH 305; Ex. 62.

was provided classroom assistance from either a paraprofessional or a licensed special education instructor.³²

31. Notwithstanding these interventions, **[NAME REDACTED]** received failing grades in two classes – Health and Geometry – during his first trimester of tenth grade. He earned passing grades in the remaining classes.³³

32. **[NAME REDACTED]** earned higher grades, and passing grades in each subject, during the second trimester of tenth grade. The Student earned the following grades: Physical Education (A-); Reading Foundations (B-); Geometry (C); and, Physical Science (C).³⁴

33. On or about December 13, 2012, the Parents sent a letter to District Superintendent Dennis Carlson outlining concerns with the educational programs that were being provided to both of their sons – **[NAME REDACTED]** and **[NAME REDACTED]**. As the Parents described their concerns on December 13:

Educationally, **[NAME REDACTED]** has executive functioning deficits typical of a student with ADHD including low processing speed, challenges sustaining his attention, organizing and completing academic tasks within routine timelines as well as low rate of reading and low basic math facts. **[NAME REDACTED]** has frequently stated that testing was a particular challenge for him.³⁵

34. The December 13, 2013 letter did not reference dysgraphia or a specific learning disability affecting writing.³⁶

35. Prior to receipt of the December 13, 2012 letter, District officials were not aware that the Parents were dissatisfied with the services or academic supports being provided to **[NAME REDACTED]**. Until that time, District officials understood that the Parents supported the District's evaluation conclusions and program of interventions.³⁷

36. The District convened an IEP on January 4, 2013 to address the Parents' concerns and requested remedies.³⁸

37. As later summarized in introductory pages of the IEP, the Parents put forward a number of concerns at the January 4, 2013 IEP team meeting:

³² HEARING TRANSCRIPT, at 514-15, 602-03, 640-41, 644-45, 647-49, 745-47 and 750-53.

³³ Ex. 62.

³⁴ *Id.*

³⁵ Ex. 100 at 49 (emphasis added).

³⁶ See, Ex. 100 at 48-51.

³⁷ Ex. 18 at AH 107; HEARING TRANSCRIPT, at 672 and 693-94.

³⁸ Ex. 34; HEARING TRANSCRIPT, at 699.

(a) “[**NAME REDACTED**]’s parents would like him to improve his organization, task completion, testing, reading fluency and math facts.”

(b) “They have concerns about his low processing skills.”

(c) “They would like [**NAME REDACTED**] to be directed in the use of his planner and for his case manager to check in daily with him to make sure it is completed.”

(d) “Parents would like weekly emails from the case manager to help with identifying missing assignments and behaviors during a one week period.”

(e) “They would like to reduce the busy work in his classes and have assignments modified for length.”

(f) “Parents want [**NAME REDACTED**] to receive syllabi from all of his classes with due dates for large assignments and projects.”

(g) “They would also feel that [**NAME REDACTED**] would have more success in school if he were to have a full set of books at home from all of his classes.”³⁹

38. Following the meeting, the District proposed a significant change to the existing IEP. The modifications and adaptations offered to [**NAME REDACTED**] closely tracked the concerns raised by the [**PARENTS’ SURNAME REDACTED**] during the IEP meeting. The District agreed that:

(a) “When participating in mainstream classes with support staff, they will assist him with reading and writing tasks, give verbal cues and help with organization and help him to pay attention to class activities.”

(b) “The support staff will help provide redirection as needed and have frequent checks for understanding.”

(c) “Seat[ing for [**NAME REDACTED**]] in low distraction area of the classroom.”

(d) “Will be able to use the drop-in room to complete tests [and] quizzes.”

(e) “Extra set of textbooks will be kept at home.”

(f) “It would help [**NAME REDACTED**] to have shortened assignments to avoid frustration that may cause shut-down, to have a

³⁹ Ex. 33, at 184.

focus on quality rather than quantity of work, and to administer true/false or multiple choice tests rather than essays or questions that are open-ended.”

(g) “[NAME REDACTED] may have Pass/Fail grading.”

(h) “Tests may be modified by providing an example, and eliminating one choice on a multiple choice test.”

(i) “[NAME REDACTED] may retest if he has all of his assignments completed and scores are lower than 70%.”

(j) “Test will be read aloud.”

(k) “Test may be modified.”

(l) “[NAME REDACTED] will have additional time on tests.”

(m) “Teacher can reduce busy work by making modifications and lengths of his assignments.”

(n) “[NAME REDACTED] will use assignment note book and be able to have daily check-ins with his case manager.”⁴⁰

39. The Parents consented to the proposed changes to the revised IEP.⁴¹

40. The faculty and paraprofessionals working in [NAME REDACTED]’s classes were informed of the changes to the IEP. Further, [NAME REDACTED], [NAME REDACTED]’s case manager, interacted with classroom staff to ensure that the provisions of the revised IEP were being implemented.⁴²

41. As the revised adaptations were implemented, [NAME REDACTED] appeared to make progress on completing assignments and becoming current on his school work.⁴³

42. On May 8, 2013, while in class during the first period of the day, [NAME REDACTED] [INFRACTION REDACTED].⁴⁴

43. For this misconduct, the District proposed a 3-day, “in-school suspension,” to be completed at the District Modified Learning Center (“DMLC”). As District officials

⁴⁰ Ex. 33, at 183 and 189-90.

⁴¹ HEARING TRANSCRIPT, at 703-04.

⁴² HEARING TRANSCRIPT, at 707-09.

⁴³ HEARING TRANSCRIPT, at 713.

⁴⁴ Ex. 41 at AH 262; HEARING TRANSCRIPT, at 711-12.

explained, the DMLC facility was a supervised setting at which **[NAME REDACTED]** could receive and complete classroom assignments that were assigned during the suspension period.⁴⁵

44. Because the Parents elected to have **[NAME REDACTED]** complete the period of suspension at home, **[NAME REDACTED]**'s case manager, **[NAME REDACTED]**, collected the assignments made in **[NAME REDACTED]**'s classes and sent these items to the **[PARENTS' SURNAME REDACTED]** home by way of **[NAME REDACTED]**'s younger brother.⁴⁶

45. Following the end of the suspension period, **[NAME REDACTED]** returned to school having completed none of the assigned class work.⁴⁷

46. Uncompleted classwork negatively impacted **[NAME REDACTED]**'s third trimester grades. He finished the school year with the following grades: Reading Foundations (F); Geometry (C); U.S. History (D) Foods (D+); and Investigating Careers (C).⁴⁸

47. The Parents requested a due process hearing on May 22, 2013.⁴⁹

48. By way of a letter dated June 14, 2013, and sent to the Parents, the District offered **[NAME REDACTED]** the opportunity to enroll in the District's summer credit recovery program. **[NAME REDACTED]** did not enroll in the program.⁵⁰

49. The record shows that **[HS]** staff put in place numerous interventions reasonably calculated to result in educational benefit. The supports and interventions offered to **[NAME REDACTED]** included specialized coursework,⁵¹ modifications to regular education assignments,⁵² staff assistance⁵³ and resources outside of the regular school day to complete assignments and earn academic credit.⁵⁴

⁴⁵ HEARING TRANSCRIPT, at 711-12.

⁴⁶ *Id.* at 712-14.

⁴⁷ *Id.* at 714.

⁴⁸ Ex. 62.

⁴⁹ *Notice and Order for Hearing*, MDE File No. 13-026-H.

⁵⁰ Ex. 60; HEARING TRANSCRIPT, at 282-86.

⁵¹ HEARING TRANSCRIPT, at 181, 586-87, 603, 640, 644-45, 647-48, 687, 707-08 and 751.

⁵² HEARING TRANSCRIPT, at 539 and 603-604.

⁵³ Ex. 10; HEARING TRANSCRIPT, at 543 and 648-49 (Access to Drop-In Room); 602-03, 605, 609, 673, 681, 745-47 (Support from Paraprofessionals in the Classroom); 514-15, 640-41, 644-45, 648-49, 745-47 and 750-53 (Instruction and Support from Special Education Case Manager).

⁵⁴ HEARING TRANSCRIPT, at 534, 537-38 and 674-75 (Extended School Year – Credit Recovery Program); 536 (District Modified Learning Center); 537, 548, 687-88, 710-11, 755-56 and 758 (Lighthouse); and 710-11 and 756 (After School Support).

The Second Pre-Hearing Order and the Evidentiary Hearing

50. Following consultation with the parties as to the number of days reasonably needed for the evidentiary hearing, the Administrative Law Judge entered an order setting aside three days for a hearing.⁵⁵

51. The scheduling order likewise apportioned equal amounts of hearing time between the Student and the District. Each party was “granted 9 hours of hearing time to present the testimony of its witnesses and to conduct cross-examination of the opposing party’s witnesses.” Lastly, the Order directed counsel “to plan their hearing presentations accordingly.”⁵⁶

52. Following the entry of the Second Pre-Hearing Order, the case became less complex. The settlement of the Student’s claims for prospective relief simplified the later hearing presentations for both parties.⁵⁷

53. The hearing record makes clear that Counsel for the Student did not appreciate, before the evidentiary hearing was underway, that the Student would only be permitted “9 hours of hearing time to present the testimony of [the Student’s] witnesses and to conduct cross-examination of the [District’s] witnesses.”⁵⁸

54. The Student asserts that any limitation on the amount of time afforded to the parties to conduct direct-examination or cross-examination during a hearing under Individuals with Disabilities Education Act (IDEA), violates the Due Process guarantees of the Fourteenth Amendment.⁵⁹

55. The hearing record similarly makes clear that Counsel for the District understood the limitations in the Second Pre-Hearing Order. He used the examination time apportioned to his client sparingly and tightly focused his questioning of witnesses on the elements of the District’s defense.⁶⁰

56. Even after being advised by the Administrative Law Judge that each side would only be permitted a total of nine hours to conduct direct examination and cross-examination, Counsel for the Student did not adjust her trial tactics. For example, when asked by the Administrative Law Judge if she wished to reserve examination time for witnesses other than **[CASE MANAGER NAME REDACTED]**, Counsel for the Student elected to “continue on precisely as I designed, as I typically design in any case.”⁶¹

⁵⁵ TRANSCRIPT OF JUNE 14, 2013 PRE-HEARING CONFERENCE, at 9-11.

⁵⁶ SECOND PRE-HEARING ORDER, at 2.

⁵⁷ See, e.g., HEARING TRANSCRIPT, at 45 - 53.

⁵⁸ *Id.* at 444-48.

⁵⁹ See, e.g., *id.* at 445-46 and 792-93.

⁶⁰ See, *id.* at 576.

⁶¹ *Id.* at 612; see also, *id.* at 557-58.

57. The Student and the District each examined witnesses during the first and third days of the hearing. The Student was the only party to examine witnesses during the second, full-day of hearing.⁶²

58. Following the close of the evidentiary hearing, Counsel for the Student was permitted to detail in an offer of proof the items, by subject area, that the Student was not able to address within 9 hours of hearing time. Given the range and breadth of the listed topics, and Counsel's preferred style of examining witnesses, it is likely than an additional 3 days of hearing would have been required to complete the hoped-for presentation.⁶³

59. Presentation of the remaining claims and defenses in this case did not require additional hearing days. Had Counsel for the Student planned her hearing presentation with the hearing time limitation in mind, she could have thoroughly and completely presented the Student's claims for relief using far fewer than 9 hours of hearing time to examine the Student's witnesses and cross-examine the District's witnesses.

Based upon these Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Minnesota Department of Education and the Administrative Law Judge have jurisdiction to consider the Student's request for a due process hearing.⁶⁴

2. The parties received proper and timely notice of the time and place of the hearing and the disputed issues. This matter is properly before the Department and the Administrative Law Judge.

3. Under the IDEA, the Student is entitled to receive a free appropriate public education (FAPE).⁶⁵

4. A School District shall conduct a full, individual evaluation of a child with a disability.⁶⁶

5. When conducting an evaluation or reevaluation, the School District must gather relevant functional, developmental, and academic information that may assist in determining the content of a later IEP, including information related to "enabling the

⁶² *Id.* at 3, 300 and 574.

⁶³ *Id.* at 807-14.

⁶⁴ Minn. Stat. §§ 14.50, 125A.091, subd. 12; 20 U.S.C. § 1415 (f); 34 C.F.R. § 300.511.

⁶⁵ 20 U.S.C. § 1401 (9); 20 U.S.C. § 1412 (a)(1)(A).

⁶⁶ 20 U.S.C. § 1414 (a)(1)(A).

child to be involved in and progress in the general education curriculum.” The child shall be assessed in all areas of suspected disability.⁶⁷

6. When conducting an evaluation or reevaluation the School District must consider existing evaluation data including evaluations and information provided by the parents of the child.⁶⁸

7. When the Parent obtains an independent evaluation, the School District must consider the results of the evaluation in any decision made with respect to the provision of FAPE.⁶⁹

8. The burden of proof is on the Student to demonstrate by a preponderance of the evidence each of the alleged violations.⁷⁰

9. The Parent and Student did not establish that the District failed to identify the Student as having a Specific Learning Disability.

10. The Parent and Student did not establish that the District failed to include a statement of measurable annual goals, including benchmarks or short-term objectives, related to the Student's needs, in his Individualized Education Plans.

11. While there were shortcomings in documenting the interventions in this case, the Parent and Student did not establish that the District failed to accurately measure the progress towards annual goals and report on this progress.

12. The shortcomings in documentation notwithstanding, the promised services did occur. The Student received educational services “specifically designed” to meet his needs, “supported by such services as are necessary to permit the child to benefit educationally from that instruction.”⁷¹

13. The Parent and Student did not establish that the District failed to provide the Student with a free appropriate public education.

Based upon these Conclusions, and for the reasons explained in the accompanying Memorandum, the Administrative Law Judge makes the following:

⁶⁷ 20 U.S.C. §§ 1414 (a)(2)(A) and (a)(3)(B).

⁶⁸ 20 U.S.C. § 1414(c)(1); 34 C.F.R. § 300.305.

⁶⁹ 34 C.F.R. § 300.502 (c).

⁷⁰ *M.M. v. Special School Dist. No. 1*, 512 F.3d 455, 458-59 (8th Cir. 2008); *Pachl v. Seagren*, 453 F.3d 1064, 1068 (8th Cir. 2006); see also, *P.K.W.G. v Indepen. Sch. Dist. No. 11*, 2008 WESTLAW 2405818 *9 (D. Minn. 2008); Minn. Stat. § 125A.091, subd. 16.

⁷¹ See, *Board of Education v. Rowley*, 458 U.S. 176, 206-07 (1982).

ORDER

IT IS HEREBY ORDERED THAT:

- (1) The Parent's complaint is DISMISSED.

Dated: September 20, 2013

s/Eric L. Lipman
ERIC L. LIPMAN
Administrative Law Judge

Reported: Kirby A. Kennedy & Associates, transcribed (4 volumes)

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

[NAME REDACTED]'s parents would like him to graduate from high school and attend college. This goal is imperiled by **[NAME REDACTED]**'s failing grades.⁷²

The key fault line between the parties in this case is who is properly accountable for **[NAME REDACTED]**'s disappointing grades and performance at school. The Student and the Parents assert that but for the School District's misidentification of **[NAME REDACTED]**'s disabilities, and its failure to provide needed services, **[NAME REDACTED]** would not have received failing grades. For its part, the District argues that it is **[NAME REDACTED]**'s unwillingness to do school work – even when that work is supported and scaled to his needs – that explains his disappointing performance. The District maintains that it did all that the law requires, and more, to assist **[NAME REDACTED]**: It thoroughly evaluated his needs, provided a wide-range of beneficial services and closely monitored his progress toward educational goals.

The key question in this case is a difficult one, both legally and morally: Can a student with ADHD fail classes for not completing his school work? This claim, and others, is discussed in detail below.

⁷² See, e.g., HEARING TRANSCRIPT, at 65-66.

The Specific Learning Disability Claim

The Student asserts the District failed to identify **[NAME REDACTED]** as having a Specific Learning Disability – dysgraphia – and likewise failed to provide appropriate interventions so that **[NAME REDACTED]** could access a high school education.⁷³ A key element of the Student's proof in this regard is an evaluation report completed by Doctors L **[NAME REDACTED]** and K **[NAME REDACTED]** in August of 2006. At the time, each worked for **[NAME REDACTED]** Center.

Regrettably, notwithstanding the discussion of the evaluation report with two witnesses,⁷⁴ this report was not offered for admission into the record by either party.⁷⁵

While parties are permitted to use items that have been marked for identification at trial, and not later offer these items for inclusion in the hearing record,⁷⁶ the Administrative Law Judge may not rely upon evidence that was not offered and received into the record.⁷⁷

Similarly problematic is that while the Parents had copies of the **[NAME REDACTED]** evaluation since the summer of 2006, and furnished the same to school officials,⁷⁸ the claim that the District failed to evaluate for dysgraphia is of very recent vintage. It follows after a series of approvals from the parents for the evaluation of **[NAME REDACTED]** and their concurrence with different conclusions as to **[NAME REDACTED]**'s disabilities.⁷⁹

While the case law is clear that Parents do not waive their rights to assert due process claims if they consent to implementation of an IEP, that consent is powerful evidence that the claimed defects in the IEP were not reasonably apparent to members of the IEP team.⁸⁰

⁷³ *Id.* at 61-64.

⁷⁴ *Id.* at 118-19, 134-39, 247-48 and 513-14.

⁷⁵ *Id.* at 4, 301 and 475 (Daily Summaries of Exhibits Offered into the Hearing Record).

⁷⁶ The evidentiary rule is both permissive and conditional: Parties using writings to refresh recollection may introduce those portions of the documents that are otherwise admissible. See, Minn. R. Evid. 612 ("Writing Used to Refresh Memory") ("if a witness uses a writing to refresh memory for the purpose of testifying ... an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and if otherwise admissible to introduce in evidence those portions which relate to the testimony of the witness") (emphasis added).

⁷⁷ Minn. R. 3525.4320, subp. 2 ("All evidence to be considered in the case must be offered and made a part of the record in the case. The hearing officer must not consider any other factual information or evidence in the determination of the case").

⁷⁸ HEARING TRANSCRIPT, at 766.

⁷⁹ See, e.g., Ex. 22 at AH 129-31; Ex. 29 at AH 157-60; HEARING TRANSCRIPT, at 638 and 703-04.

⁸⁰ *T.G. ex rel. T.G. v. Midland Sch. Dist.* 7, 848 F. Supp. 2d 902, 915-16 (C.D. Ill. 2012) ("While a parent's failure to object to an IEP does not waive their right to challenge it, 'casts significant doubt on their contention that the IEP was legally inappropriate since it suggests that the parents were also unaware prospectively that the ... IEP was unlikely to confer educational benefit'") (citing *Carlisle Area*

Lastly, the only evidence in the hearing record as to the role dysgraphia may have played is in the District's evaluation of **[NAME REDACTED]**. The appropriate professionals concluded that **[NAME REDACTED]**'s "severe academic under achievement" followed from his ADHD "rather than a disability in a specific content area."⁸¹

The Parent and Student did not establish that the District failed to identify the Student as having a Specific Learning Disability.

Establishing Measurable IEP Goals

Federal law sets forth specific, substantive requirements for IEPs. The plans must contain statements concerning a disabled child's level of functioning; set forth measurable annual achievement goals; describe the services to be provided; and establish objective criteria for evaluating the child's progress.⁸² An IEP is legally sufficient if it is "reasonably calculated to enable the child to receive educational benefits."⁸³

The Student argues, for example, that the achievement goals in his 2012 IEP are poorly constructed, and therefore, defective. In particular, as to the second goal stated in that year's IEP – "**[NAME REDACTED]** will determine a theme or central idea of a text from a level locating information in an informational text to locating information and draw conclusions from complex informational text" – the Student makes two critiques: The goal does not reflect his current level of academic performance and is not susceptible to objective measurement.⁸⁴

The Administrative Law Judge does not agree. Both the 2012 and 2013 IEPs contain detail about **[NAME REDACTED]**'s present level of performance in the area of reading comprehension. The IEPs draw that detail, in part, from a close assessment of the results of **[NAME REDACTED]**'s "Measures of Academic Progress" (MAP) tests.⁸⁵ The District's proposal to measure **[NAME REDACTED]**'s progress on reading

School v. Scott P. By and Through Bess P., 62 F.3d 520, 536 n. 8 (3rd Cir. 1995); accord, *Alexandra R. ex rel. Burke v. Brookline Sch. Dist.*, CIV. 06-CV-0215-JL, 2009 WL 2957991 (D.N.H. 2009).

⁸¹ HEARING TRANSCRIPT, at 766; compare also, *Hinson ex rel. N.H. v. Merritt Educ. Ctr.*, 579 F. Supp. 2d 89, 102-03 (D.D.C. 2008) ("Plaintiff now challenges the very same IEP she helped craft.... Plaintiff has not proffered a single expert evaluation or opinion supporting her claim that N.H. requires full time special education or that the IEP is otherwise inappropriate.... Rather, Plaintiff proffers only her conclusory opinion that the IEP is not appropriately tailored to address 'N.H.'s deficits in expressive and receptive language [which] impact[] NH's ability to access the general curriculum.' In the absence of any such evidence, this Court cannot "substitute [its] own notions of sound educational policy for those of the school authorities which they review.") (quoting *Rowley*, 458 U.S. at 206).

⁸² See, 20 U.S.C.. § 1414(d)(1)(A).

⁸³ See, *Rowley*, 458 U.S. at 207.

⁸⁴ See, STUDENT'S POST-HEARING MEMORANDUM, at 14-15.

⁸⁵ See, Ex. 23 at AH 136; Ex. 33 at AH 187.

comprehension by having him locate and summarize information from “passages containing compound subjects or objects with 90% accuracy on three data trials,” was not so vague as to violate federal law. The fact that an educator undertakes the assessment as to whether the stated benchmark is reached does not render an IEP goal defective.⁸⁶

The Parent and Student did not establish that the District failed to include a statement of measurable annual goals, including benchmarks or short-term objectives, related to the Student's needs, in his Individualized Education Plans

Reporting on [NAME REDACTED]’s Progress Toward IEP Goals

The Student likewise argues that the District failed to meet the requirements of federal law because the District did not “accurately measure and report the Student’s progress [under] his IEPs.”⁸⁷

While there were shortcomings in the documentation and measurement of the District’s interventions, it is clear from the record that those interventions did occur and the Parents received both detailed and current information on the academic progress of their son.⁸⁸ As the federal courts have instructed “not every technical violation of the procedural prerequisites of an IEP will invalidate its legitimacy” or will “render an IEP legally defective.”⁸⁹ “Before an IEP is set aside, there must be some rational basis to believe that procedural inadequacies compromised the pupil's right to an appropriate education, seriously hampered the parents' opportunity to participate in the formulation process, or caused a deprivation of educational benefits.”⁹⁰

The shortcomings in documentation notwithstanding, the Student received educational services that were specifically designed to meet his needs, and he was supported by services that permitted him to benefit from that instruction.

⁸⁶ *R.P. ex rel. C.P. v. Prescott Unified Sch. Dist.*, 631 F.3d 1117, 1122-23 (9th Cir. 2011) (Circuit Court concluded that the goal of “improved fine motor skills” when evaluated through “8/10 benchmarks as [m]easured by [t]herapists observations and records,” was legally-appropriate, notwithstanding the parent's claim that “‘there was no objectively measured data collection,’ since measurement of his IEP goals was based on teachers' subjective observations”).

⁸⁷ See, STUDENT’S POST-HEARING MEMORANDUM, at 14-15.

⁸⁸ See, e.g., Exs. 31 and 179; HEARING TRANSCRIPT, at 589-90, 648 and 709-10.

⁸⁹ See, *Indep. Sch. Dist. No. 283, St. Louis Park, Minn. v. S.D. By & Through J.D.*, 948 F. Supp. 860, 881-82 (D. Minn. 1995) *aff’d sub nom. Indep. Sch. Dist. No. 283 v. S.D. by J.D.*, 88 F.3d 556 (8th Cir. 1996).

⁹⁰ See, *id* (citing *Murphy v. Timberlane Regional School Dist.*, 22 F.3d 1186, 1196 (1st Cir.1994); *Hampton School Dist. v. Dobrowolski*, 976 F.2d 48, 54 (1st Cir.1992); *Burke County Bd. of Ed. v. Denton*, 895 F.2d 973, 982 (4th Cir.1990); *Doe By and Through Doe v. Defendant I*, 898 F.2d 1186, 1190–91 (6th Cir.1990)).

The Guarantee of a Free and Appropriate Education

As noted above, the Student argues that his failing grades were a clear sign that the interventions provided by the District were inappropriate and insufficient to give him access to a high school education. While the Student presents a close and difficult question, in the final analysis, the Administrative Law Judge does not agree.

The federal courts explain that just as promoting a disabled student on to the next grade is not sufficient to meet the requirements of IDEA, neither does a disabled student's failing grade necessarily establish that he or she has been denied a free appropriate public education.⁹¹ Another possibility is that the District made a free appropriate public education available, but the Student did not complete the school work needed to learn.⁹²

In this case, the best reading of the hearing record is that a wide-range of supports, carefully calibrated to **[NAME REDACTED]**'s educational needs, were made available to him, and notwithstanding those interventions, **[NAME REDACTED]** did not complete enough work in order to earn passing grades.

Hearing Limitations and Due Process

Minn. Stat. § 125A.091, subd. 18 (a) and (b), places affirmative obligations on hearing officers to manage the hearing process and to "limit an impartial due process hearing to the time sufficient for each party to present its case."

The statute assumes that there is a knowable "time sufficient for each party to present its case," and it insists that the parties to a due process hearing thoroughly prepare to present their claims at trial so as to submit their evidence within that time.

The statutory requirements serve an important purpose: They shield everyone with an interest in the hearing process – parents, students, educators, school district staff, opposing counsel, the tribunal and taxpayers – from the very real burdens of an over-long trial. That interest is particularly acute in cases such as this, where regardless of the outcome of the litigation the parties still need to work productively and

⁹¹ See, *Sherman v. Mamaroneck Union Free Sch. Dist.*, 340 F.3d 87, 93-94 (2d Cir. 2003) (Circuit court concludes that "failing grades are not dispositive" and that "the failing grades must be viewed in light of the evidence as a whole," where there was evidence that the Student refused to complete school work).

⁹² See, *Hinson ex rel. N.H. v. Merritt Educ. Ctr.*, 579 F. Supp. 2d 89, 102-03 (D.D.C. 2008) ("Plaintiff has not shown that the student's poor academic performance resulted from a lack of appropriate services rather than the student's own extended absences. The Hearing Officer's conclusion that N.H. was not 'availing himself of educational benefit' under these circumstances was a reasonable determination. Indeed, it is difficult to say how the Hearing Officer could have determined that the services in the IEP were not working when the student had not yet taken advantage of those services"); *Sylvie M. v. Bd. of Educ. of Dripping Springs Indep. Sch. Dist.*, 48 F. Supp. 2d 681, 696 (W.D. Tex. 1999) aff'd, 214 F.3d 1351 (5th Cir. 2000) (School District did not fail to provide a FAPE where the IEP was tailored to the Student's needs and there was "no evidence that [the Student] could not, in fact, do the work had she chosen to do so").

collaboratively together as part of a functioning IEP team. For these reasons, the “hearing officer *must limit* an impartial due process hearing to the time sufficient for each party to present its case.”

It cannot be that the only mechanisms a hearing officer may employ to focus a party’s presentation of evidence are those which prevent inquiries into irrelevancies⁹³ or repetition of earlier questions.⁹⁴ If hearing officers cannot set reasonable limits on the overall length of the hearing, they simply will not be able to “limit an impartial due process hearing” as required by Minn. Stat. § 125A.091, subd. 18.

Volume II of the transcript in this proceeding makes the point plain. Nearly all of the questions propounded by the Student’s counsel on the second day of the hearing had “[some] tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence”⁹⁵ – but most were not essential to establishing the Student’s right to relief. And, in the main, counsel did not repeat herself.

Because the underlying educational record included hundreds of documents, and spanned several years, there were potentially many “facts of consequence.” At the close of this case, however, the hearing record included only a fraction of the exhibits that were initially marked for identification. Such a case requires sturdier controls than a simple one.

For these reasons, the limits on relevance and cumulative submissions alone are not enough to meet the objectives of Minn. Stat. § 125A.091, subd. 18.

Limiting the time period for direct examination and cross-examination was a reasonable exercise of the authority in section 125A.091, subd. 18.⁹⁶ The Student’s claims for relief could have been thoroughly and completely presented within 9 hours of hearing time.

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⁹³ See, Minn. R. Evid. 402 (“Evidence which is not relevant is not admissible”).

⁹⁴ See, Minn. R. Evid. 401 (“Although relevant, evidence may be excluded if its probative value is substantially outweighed by ... considerations of undue delay, waste of time, or needless presentation of cumulative evidence”).

⁹⁵ See, Minn. R. Evid. 401 (“‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence”).

⁹⁶ The cases cited by the Student – *State v. Petersen* and *State v. Evans*, both of which involve limiting the length of *voir dire* of potential jurors to five minutes per venireman – do not lead to a different conclusion. A five-minute limit is much more restrictive than a nine-hour limitation. Thus, while the facts in *Petersen* and *Evans* are very different than those in this case, the legal standard described in *Petersen* and *Evans* was applied here: The ALJ closely assessed the limitations on time to assure that they were reasonable in light of all of the circumstances of this case. See, *State v. Petersen*, 368 N.W.2d 320, 322 (Minn. Ct. App. 1985); *State v. Evans*, 352 N.W.2d 824, 827 (Minn. Ct. App. 1984).