

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

In the Matter of:

R.M.M.,

Student,

**SEVENTH  
PREHEARING ORDER**

and

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

School District.

This matter is before Administrative Law Judge Jim Mortenson (ALJ).

Amy Goetz, School Law Center, LLC, appears on behalf of the Parents (Parents). Laura Booth, Booth Law Group, LLC, appears on behalf of Special School District No. 1, Minneapolis Public Schools (School District).

On October 22, 2014, the Parents filed a motion to reconsider the ALJ's orders in the Fifth and Sixth Prehearing Orders. Those orders dismissed the Parents' "child-find" claim and further clarified the questions that must be answered to resolve the dispute. On October 23, 2014, the School District moved that all claims for relief be dismissed.

Based on the pleadings filed in this matter, discussions at the Prehearing Conferences, and for the reasons in the memorandum below,

**IT IS HEREBY ORDERED:**

1. The Parents' motion to reconsider is **DENIED**.
2. The School District's motion to dismiss is **DENIED**.

Dated: November 6, 2014

s/Jim Mortenson  
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JIM MORTENSON  
Administrative Law Judge

## MEMORANDUM

The Parents ask for reconsideration of the dismissal of their “child find” claim and the clarification of their free appropriate public education (FAPE) claim in advance of the evidentiary hearing. Additionally, the School District asks that the dismissal be extended to include all of the claims made by the Parents. Each of these requests for relief is addressed in turn below.

### **Dismissal of the “Child Find” Claim**

The Parents assert that dismissal of their child find claim has left Student without an adequate remedy and “immunized the District’s failure to find her eligible for special education services in a timely manner.” The Parents have requested at least six forms of relief for all of their claims.<sup>1</sup> It appears that they specifically seek compensatory education in the form of a prospective placement, at a non-public school, at public expense, as relief for the alleged child find violation.<sup>2</sup>

It is important to emphasize that the child find claim in this case was combined with an alleged denial of FAPE. If the Parents can establish that the School District failed to make a FAPE available, the Student would be entitled to those remedies which further the purposes of the Individuals with Disabilities Education Improvement Act (IDEA).<sup>3</sup>

Moreover, whether the Student’s entitlement to relief follows from a delay identifying and evaluating her disability, or a delay in providing services, is a difference in semantics only. The Student was entitled to services that met her unique needs resulting from her disability and enabled her to be involved in and make progress in the general education curriculum.<sup>4</sup> This is the issue that must now be examined.

#### **A. IDEA Guarantees the Right to an Appropriate Education**

Resisting a recasting of their claims, the Parents advance a tort-like legal theory. The Parents maintain that for every misstep in the educational process there must be a corresponding remedy. Specifically, the Parents argue that because the Student was not timely-identified as eligible for services, even if that eligibility is now acknowledged or the impact of the delay unclear, compensatory educational services must follow.

In the view of the Administrative Law Judge, this misapprehends both the structure and substance of IDEA. As the U.S. Supreme Court noted in *Board of Education of Hendrick Hudson Central School Dist. v. Rowley*, the Act does not guarantee either particular educational outcomes or assure that all services will be delivered error-free. Rather, as Justice Rehnquist explained, Congress guaranteed that disabled students would have meaningful access to educational services and the opportunity to benefit:

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<sup>1</sup> COMPLAINT, at 11 (August 14, 2014).

<sup>2</sup> PARENTS’ MOTION, at 7 (October 22, 2014).

<sup>3</sup> *School Committee of Town of Burlington, Mass. v. Dept. of Educ. of Mass.*, 471 U.S. 359, 369 (1985).

<sup>4</sup> 34 C.F.R. §§ 300.39, .304, .305, .311, .320, .321, .324, .530, .704.

Noticeably absent from the language of the statute is any substantive standard prescribing the level of education to be accorded handicapped children. Certainly the language of the statute contains no requirement like the one imposed by the lower courts—that States maximize the potential of handicapped children “commensurate with the opportunity provided to other children.” That standard was expounded by the District Court without reference to the statutory definitions or even to the legislative history of the Act.

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But in seeking to provide such access to public education, Congress did not impose upon the States any greater substantive educational standard than would be necessary to make such access meaningful. Indeed, Congress expressly “recognized that in many instances the process of providing special education and related services to handicapped children is not guaranteed to produce any particular outcome.” Thus, the intent of the Act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside.<sup>5</sup>

The IDEA assures meaningful access for disabled students by focusing its dispute-resolution processes on particular decision-making points – namely a proposal or refusal “to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child.”<sup>6</sup> This framework points to specific events and times: when there is a proposal for services or a refusal of services.

The Parents’ claims of delayed identification and corresponding denial of FAPE over a period of years are not appropriate because the Student has been identified. If Parents were satisfied with the services offered to the Student when she was determined eligible, there would be no basis for a claim under IDEA. If they disagree with proposed services, or services were refused, there is an allegation of denial of FAPE to be examined. That is how the ALJ is managing this hearing, in order to avoid unnecessary

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<sup>5</sup> *Board of Ed. of Hendrick Hudson Central School Dist. v. Rowley*, 458 U.S. 176, 189-92 (1982); see also, *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) (“not every technical violation of the procedural prerequisites of an IEP will invalidate its legitimacy” or will “render an IEP legally defective”).

<sup>6</sup> 34 C.F.R. § 300.507(a)(1), referencing 34 C.F.R. § 300.503(a)(1) and (2); See also Minn. Stat. § 125A.091, subd. 12 (“A parent or a district is entitled to an impartial due process hearing conducted by the state *when a dispute arises* over the identification, evaluation, educational placement, . . . or the provision of a free appropriate public education to a child with a disability”); Minn. Stat. § 125A.091, subd. 14 (“A parent or school district may file a written request for a due process hearing regarding the proposal or refusal to initiate or change that child’s evaluation, individualized education program, or educational placement, or to provide a free appropriate public education.”)

use of time and resources on non-IDEA claims based on either tort theories or discrimination theories.

With respect to compensatory educational services, not every error will result in a compensatory education award. Instead, the hearing officer must find both 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.”<sup>7</sup> More importantly, any potential award must be appropriate to address a demonstrated loss of educational benefit, including an IEP not reasonably calculated to provide educational benefit. The law does not require the award, if necessary, to be the one requested by the complainants.<sup>8</sup>

### **B. Identifying the Questions that Must be Answered to Resolve the Dispute**

Administrative Law Judges presiding over special education hearings have broad discretion to award appropriate relief that is designed to ensure the purposes of IDEA are met.<sup>9</sup> The ALJ also has authority to manage and control the hearing process to ensure the process is fair, efficient, and results in an effective disposition.<sup>10</sup> In fact, Minnesota law specifically charges hearing officers to “identify the questions that must be answered to resolve the dispute and eliminate claims and complaints that are without merit.”<sup>11</sup> In this case, this is precisely what the ALJ has done by properly focusing the Parents’ remaining claim on what was proposed or refused when their child was determined eligible.

### **C. Forest Grove Does Not Lead to a Different Conclusion**

The decision of the U.S. Supreme Court in *Forest Grove School District v. T.A.*,<sup>12</sup> does not lead to a different conclusion. *Forest Grove* involved a student who had not been identified as a child with a disability.<sup>13</sup> The case originated because there was a dispute between the parents and the school district as to whether the student was, in fact, eligible for special education services.<sup>14</sup> Disagreeing with the school district’s determination as to the student’s eligibility, the parents enrolled their son in a private school and requested a due process hearing.<sup>15</sup> The question presented to the Supreme Court was whether the parents were barred from seeking reimbursement of private school expenses because the student had never received special education services

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<sup>7</sup> Minn. Stat. § 125A.091, subd. 21 (2014).

<sup>8</sup> 34 C.F.R. §. 300.508(b)(6), *See also Garcia v. Bd. of Educ. of Albuquerque Pub. Sch.*, 520 F.3d 1116, 1129 (10<sup>th</sup> Cir. 2008).

<sup>9</sup> *School Committee of Town of Burlington, Mass. v. Dept. of Educ. of Mass.*, 471 U.S. 359, 369 (1985).

<sup>10</sup> Minn. Stat. § 125A.091, subds. 15, 18 (2014).

<sup>11</sup> Minn. Stat. § 125A.091, subd. 15(1) (2014).

<sup>12</sup> *Forest Grove School District v. T.A.*, 557 U.S. 230 (2009).

<sup>13</sup> *Id.* at 233-34.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

from the public school system.<sup>16</sup> The Supreme Court determined there was no such bar under federal law.<sup>17</sup>

This is not our case. Unlike *Forest Grove*, there is no dispute as to whether the Student is eligible for special education and related services under the IDEA. Further, the Student's enrollment in a private school did not follow a dispute with the Minneapolis schools over the type of special education services to be provided.

For these reasons, the holding in *Forest Grove* does not stand for the propositions that compensatory education is the only proper remedy for the claimed injuries, or that a hearing must be held on the question of an untimely eligibility determination when a superseding FAPE claim is present.

### **School District's Motion to Dismiss**

In the Fifth Prehearing Order, the ALJ granted the Parents permission to amend their Complaint. The Parents' request for leave to amend their Complaint was based upon the reasoning in a decision of the Minnesota Court of Appeals,<sup>18</sup> which held that Minnesota law exceeded federal requirements by guaranteeing a FAPE to students with disabilities who were enrolled by their parents in non-public schools. That question will not be revisited here. However, the School District argues that Minnesota law does not exceed federal law with respect to the right of parents to go to hearing on issues concerning a FAPE for these same students.

Federal law limits the rights of students with disabilities who have been placed by their parents in non-public schools. Such children, under federal law, do not have "an individual right to receive some or all of the special education and related services that the child would receive if enrolled in a public school."<sup>19</sup> They are entitled to "equitable services" and the public school district "must make the final decisions with respect to the services to be provided to eligible parentally-placed private school children with disabilities."<sup>20</sup> The services provided to the children are to be documented in a "services plan," as opposed to an individualized education program (IEP).<sup>21</sup> Because the definition of FAPE includes special education and related services that are provided in conformity with an IEP that meets the requirements of 34 C.F.R. §§ 300.320-.324, this construct serves to limit FAPE to children placed by their parents in non-public schools.<sup>22</sup>

Yet, federal law does not, as the District argues, limit due process hearings for children placed in non-public schools by their parents to child find disputes. Federal law

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<sup>16</sup> *Id.* at 236-37.

<sup>17</sup> *Id.* at 247.

<sup>18</sup> *Independent School Dist. No. 281 v. Minnesota Dept. of Educ.*, 743 N.W.2d 315 (Minn. Ct. App. 2008).

<sup>19</sup> 34 C.F.R. § 300.137(a). *See also* 34 C.F.R. § 300.138(a)(2) "Parentally-placed private school children with disabilities may receive a different amount of services than children with disabilities in public schools."

<sup>20</sup> *Id.* at (b)(2).

<sup>21</sup> 34 C.F.R. §§ 300.132, .137(c), .138(b).

<sup>22</sup> *See* 34 C.F.R. § 300.17.

restricts parents from filing due process complaints on whether the public school “failed to meet the requirements of §§ 300.132 through 300.139, including the provision of services indicated on the child’s services plan.”<sup>23</sup> The referenced sections of the regulations pertain to child-find and the requirements for determining and providing equitable services. Thus, an exception, which corresponds to the underlying guarantees, is made for due process complaints on child find issues.<sup>24</sup> However, the remainder of the regulation is left undisturbed. It does not bar complaints on other issues.

Specifically, 34 C.F.R. § 300.140 does not address due process complaints about FAPE for children who have been placed in non-public schools by their parents. However, there would be little to address in such a situation because complaints about the procedural due process involved in developing the plans, complaints about the plans themselves, and complaints about the delivery of the services in the plans have all been removed. The law does not categorically bar FAPE claims, although under the federal schema such claims would be rare.

Even if federal law was read to prohibit all but child find claims, Minnesota law does not contain such an exception. Minnesota law, as described in the Fifth Prehearing Order, exceeds the federal guarantees and entitles children with disabilities placed by their parents in non-public schools a FAPE.<sup>25</sup> Just as it assures a FAPE to *all* students with disabilities, Minnesota ensures a right to a hearing for *all* parents of students with disabilities over disputes about identification, evaluation, educational placement, or the provision of FAPE to children with disabilities.<sup>26</sup>

It is not a sensible reading of the statutes to conclude that the legislature would guarantee a FAPE but withhold the due process complaint process needed to make the guarantee meaningful.<sup>27</sup> The School District’s argument that the only venue for the Parents’ claim is the state complaint process under 34 C.F.R. §§ 300.151-.153 is inapposite. The federal regulations only point to that venue exclusively for complaints about service plans and equitable services.<sup>28</sup>

The School District also argues that the jurisdiction of the ALJ is limited by the statute of limitations in this case. The statute of limitations period covers two years before the parents knew or should have known about the alleged action that formed the basis of their complaint and the two years following that time within which they were required to file a complaint.<sup>29</sup> Because the issue for hearing has been framed in terms of what was proposed or refused in 2014, the parents obviously knew about the alleged

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<sup>23</sup> 34 C.F.R. § 300.140(a).

<sup>24</sup> 34 C.F.R. § 300.140(b). Child-find is a term of art used in the law to describe the process of locating, identifying, and evaluating children with disabilities. See e.g. 34 C.F.R. §§ 300.111(a), .131(a).

<sup>25</sup> See Fifth Prehearing Order, at 3-4.

<sup>26</sup> Minn. Stat. § 125A.091, subd. 12. No exceptions, similar to the construct created in Federal law at 34 C.F.R. §§ 300.130-.144, appear in Minnesota statutes or rules.

<sup>27</sup> Certainly, the Legislature could do this, but nowhere in State Statute has it done so.

<sup>28</sup> 35 C.F.R. § 300.140(c).

<sup>29</sup> 34 C.F.R. §§ 300.507(a)(2), .511(e).

violation both within two years of it occurring and filed their complaint within two years of their knowledge.<sup>30</sup> Thus, the statute of limitations is not a defense in this matter.

For these reasons, the Parents' motion to reconsider the relevant decisions in both the Fifth and Sixth Prehearing Orders is denied. The School District's motion to dismiss the complaint is also denied.

**J. R. M.**

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<sup>30</sup> See Complaint, at 8; District Response to Complaint, dated September 2, 2014, at 2.