

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

[Parents], on behalf of [Student],

v.

**SECOND
PREHEARING ORDER**

[School District A] and [School District B].

This matter came on for a prehearing conference before Administrative Law Judge Jim Mortenson on December 11, 2015. Amy Goetz, School Law Center, LLC, appeared on behalf of Student and Parents. Tim R. Palmatier and Adam Wattenberger, Kennedy & Graven, Chartered, appeared on behalf of School District A. Amy Mace and John Edison, Rupp, Anderson, Squires & Waldspurger, P.A., appeared on behalf of School District B.

Pursuant to the administrative record, Minn. Stat. § 125A.091 (2014), Minn. R. 3525.4110 (2015), and the proceedings herein,

IT IS HEREBY ORDERED:

1. School District B is **DISMISSED** from this proceeding.¹
2. The parties are encouraged to resolve this matter themselves. A resolution meeting has been scheduled for December 17, 2015. A resolution meeting must be held on or before December 22, 2015, pursuant to 34 C.F.R. § 300.510. If the parties resolve any or all of the issues herein, they are to inform the Administrative Law Judge as soon as possible. If the parties agree in writing to waive the resolution meeting; or that after either the resolution meeting or a mediation starts, that no agreement is possible, they are to inform the Administrative Law Judge as soon as possible, including providing a copy of the signed agreement.
3. School District A is compiling education records for the Parents and will provide them to the Parents as soon as possible, but in no event later than December 16, 2015. Parents' access to education records may be subsequently addressed, if necessary.
4. Parents' request for an independent educational evaluation (IEE) prior to the hearing is **DENIED**.²

¹ Rationale explained in the Memorandum.

² Rationale explained in the Memorandum.

5. The issues to be resolved at hearing are:³
- 1) Did the School District fail to provide Student with an evaluation sufficiently comprehensive to identify all of his special education and related service needs, whether or not commonly linked to the disability category in which the child has been classified, when the School District failed to ensure a diagnostic assessment for suspected Attention Deficit Hyperactivity Disorder was not provided and an assessment to determine whether Student has dyslexia was not provided?
 - 2) Did the School District fail to provide Student with an IEP reasonably calculated to enable Student to be involved in and make progress in the general education curriculum because the September 24, 2015, IEP lacks:
 - a. an accurate statement of Student's present levels of academic achievement and functional performance;
 - b. annual academic goals aligned with state content standards; and
 - c. special education and related services that will enable Student to advance appropriately toward attaining the annual goals and to be involved in and make progress in the general education curriculum?
 - 3) Did the School District fail to provide Student with special education and related services in conformity with his IEP because, among other possible failings, Science and English tests were not administered orally?⁴
 - 4) If the answer to any of the above questions is affirmative, whether that failure resulted in a failure to provide an appropriate evaluation or in a denial of free appropriate public education (FAPE), for which any or all of the following remedies are appropriate:
 - a. the provision of an IEE at public expense;
 - b. reimbursement to Parents for privately provided assessments and tutoring;
 - c. changes to Student's IEP, including the provision Orton-Gillingham reading and System 44 reading; and

³ Parents have objected to the Judge's clarification of the issues for hearing. The Judge is required to "identify the questions that must be answered to resolve the dispute . . ." Minn. Stat. § 125A.091, subd. 15 (2014). The issues identified here capture the questions that must be answered based on the totality of the complaint and are based on discussion at the prehearing conference.

⁴ Parents are directed to update this claim as soon as possible following their receipt of Student's educational records. If this claim is not updated by the start of the 45-day hearing timeline, further claims related to implementation of the IEP will not be considered.

- d. compensatory education to remedy the alleged educational harm to Student of being six years below grade level in reading?⁵

6. Another telephone prehearing conference will be held on **Monday, December 21, 2015**, at **9:30 a.m.** At the appointed hour, counsel for the parties⁶ are directed to:

- a. Dial **1-888-742-5095** and, when prompted,
- b. Enter the Conference Code: **685 684 1864#**.

7. At the second prehearing conference the Administrative Law Judge will, among other things:

- a. Request status of resolution meeting, whether any issues or related disputes have been resolved, and encourage the parties to continue to work to resolve any remaining issues themselves or with a mediator;
- b. Discuss the response to the complaint;
- c. Determine whether there are undisputed material facts;
- d. Set a scheduling order for all hearing activities including, but not limited to, summary disposition if there are no material facts in dispute;
- e. Require the parties to establish lists of exhibits and witnesses necessary for each party to make its case, address any requests to compel the attendance of witnesses, determine the necessity of telephone testimony and other accommodations, and request a list of undisputed material facts;
- f. Determine the amount of time parties will have to present their cases;
- g. Determine the location of the hearing and whether it will be open to the public;
- h. Determine whether any accommodations or interpreters will be required for parties or witnesses;

⁵ Parents are encouraged to inform the Judge and School District of the specifics of their requests as soon as possible in order to 1) encourage settlement, and 2) meet their burden of proof if this matter proceeds to hearing.

⁶ All parties in this matter are represented by counsel. Only counsel are required to participate in the prehearing conference. Counsel may have parties, or other party representatives, be present at the prehearing if they so choose.

- i. Determine whether opening and closing statements will be made orally or in writing; and
- j. Any other matter raised by a party or the Judge in managing the hearing process for this case.

Dated: December 15, 2015

s/Jim Mortenson

JIM MORTENSON
Administrative Law Judge

MEMORANDUM

Dismissal of School District B

School District B, Student's school district of residence, is dismissed from this case because Student's parents open-enrolled Student into School District A. Minn. R. 3525.0800, subp. 8 (2015), provides that students who are placed by their parents in a school outside of their resident school district must be provided an appropriate education and the providing district is responsible for due process. This is consistent with idea that "challenges to the student's previous education [provided by another school district] become moot because the new school district is responsible for providing a due process hearing."⁷ Thus, read together, these legal concepts make clear that the obligation to provide a student who is eligible for special education under the Individuals with Disabilities Education Improvement Act (IDEA), who has open-enrolled in a school district, is entitled to appropriate educational services from that school district. The new school district has the due process responsibilities for the student and parents.

Because Student is open-enrolled in School District A, School District A is the only responsible school district at this time. School District B is appropriately dismissed from further proceedings in this matter.⁸

⁷ *Thompson By and Through Thompson v. Board of Special School District No. 1*, 144 F. 3d 574, 579 (8th Cir. 1998).

⁸ A question was raised at the prehearing about whether another entity, the [Service Cooperative], named by the Parents in their complaint, was party to this matter. Because the [Service Cooperative] is a service cooperative, not a school district, it cannot be a party to a proceeding under IDEA and Minn. Stat. § 125A.091. (See also Minn. Stat. Chap. 123A).

Prehearing Request for IEE

Parents have requested an IEE prior to the hearing and as a remedy to their claims. Parents, generally, are entitled to an IEE at public expense when they disagree with a school district's evaluation.⁹ The school district must provide the requested IEE without unnecessary delay unless the school district requests a due process hearing in order to demonstrate that its evaluation of the student is appropriate.¹⁰ "If a hearing officer requests an [IEE] as part of a hearing on a due process complaint, the cost of the evaluation must be at public expense."¹¹ In this case, Parents have effectively asked the Judge to request the IEE. For the reasons that follow, the Judge declines to do so.

The due process complaint states that there is evaluation data, including evaluation data Parents privately obtained in 2014. The due process complaint includes specific factual allegations about Student's educational performance. The due process complaint also includes an allegation that school staff have concluded Student cannot learn to read, and therefore an IEE "is necessary to assist the parties or hearing officer to determine whether or not this is a supportable conclusion. . . ."¹² Parent's burden of proof with regard to facts concerning development of the individualized education program (IEP) requires they demonstrate what they allege school staff concluded. This cannot be done with additional evaluation data.

If Parents make their showing, it will impact the determinations on Issues Two and Four. The School District, in such a situation, will have to show it had evaluation data to support the conclusion at the time the conclusion was drawn. New evaluation at this point in time will not impact that.

Furthermore, Parents' assertion that the Administrative Law Judge will require evaluation data in order to determine appropriate remedies if their substantive claims are upheld is not convincing. Parents have alleged they have independent evaluation data from 2014. Their claims show they understand how far behind his peers Student is currently performing. If Parents require more information to carry their burden, they may obtain it and disclose it pursuant to the rules.¹³ What has been alleged, however, does not indicate Parents lack data about Student's performance or educational needs. The Administrative Law Judge does not see from the pleadings that additional evaluation data is necessary for hearing.

The Supreme Court's analysis in *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 60-61 (2005), is not contrary to this outcome. The Court noted in *Schaffer* the same provisions cited above. First, that parents may obtain an IEE at public expense if they disagree with the district's evaluation.¹⁴ The Court also noted the parents' "right to review

⁹ 34 C.F.R. § 300.502(b).

¹⁰ *Id.*

¹¹ 34 C.F.R. § 300.502(d).

¹² Complaint at 3-4.

¹³ 34 C.F.R. § 300.512(b).

¹⁴ *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 60 (2005).

all records that the school possesses in relation to their child.”¹⁵ “IDEA thus ensures parents access to an expert who can evaluate all the materials that the school must make available, and who can give an independent opinion.”¹⁶

Here, Parents allege they had a disagreement with the school district’s evaluation and, rather than request an IEE at public expense, they went and purchased their own.¹⁷ This was their right, and the School District was required to consider that evaluation data if it met the School District’s criteria.¹⁸ Parents will have the right to have their independent evaluator(s) testify about the IEE they obtained and the education records concerning Student, just as the Court affirmed in *Schaffer*. Nothing in *Schaffer* requires that parents’ experts will be at public expense.¹⁹

J. R. M.

¹⁵ *Id.*, citing 20 U.S.C. § 1415(b)(1).

¹⁶ *Id.* at 546 U.S. 49, 60-61 (2005).

¹⁷ Complaint at 3.

¹⁸ 34 C.F.R. § 300.502(c).

¹⁹ See also *Arlington Central School District Bd. of Educ. v. Murphy*, 548 U.S. 291, 300 (2006) (“In sum, the terms of the IDEA overwhelmingly support the conclusion that prevailing parents may not recover the costs of experts or consultants.”)