



Before The  
State of Wisconsin  
**DIVISION OF HEARINGS AND APPEALS**

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In the Matter of [Student]

**DECISION**

v.

DHA Case No. DPI-18-0012

DPI Case No. LEA-18-0011

[District]

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The Parties to this proceeding are:

[Student]

[District], by

Attorney Chad P. Wade  
Strang, Patteson, Renning, Lewis & Lacy, S.C.  
P.O. Box 3505  
Oshkosh, WI 54903

PROCEDURAL HISTORY

On April 23, 2018, the Wisconsin Department of Public Instruction (DPI) received a request for a due process hearing under Wis. Stat. Ch. 115 and the Individuals with Disabilities Education Improvement Act (IDEA) from [Parent] (the Parent), on behalf of [Student] (the Student) against the [District] (the District). DPI referred the matter to the Wisconsin Division of Hearings and Appeals for hearing. On May 18, 2018, the Parent filed an amended due process hearing request that restarted the applicable statutory timelines.

On June 20, 2018, the District filed a motion for summary judgment. On June 27, 2018, the Parent filed a response to the motion. On July 5, 2018, the undersigned administrative law judge issued a Ruling and Order Granting Partial Summary Judgment in which five issues were dismissed and one issue was amended, only with regard to the time period alleged.

The due process hearing was held in [City], Wisconsin, on July 31, 2018. The record closed on August 24, 2018. The decision is due by September 14, 2018.

### ISSUES

1. In its April 2018 special education evaluation of the Student, did the District improperly determine that the Student is not a child with a disability in the area of autism?
2. Did the District deny the Student a free, appropriate public education by not incorporating the XXXXX reading specialist's recommendations into the Student's April 2018 individualized education program (IEP)?
3. From the beginning of the 2017-18 school year until February 18, 2018, did the Student's special education teacher have inadequate communication with the Parent, in violation of special education law and regulations?

### FINDINGS OF FACT

1. The Student is a 17-year-old (d.o.b. [XX/XX/XXXX]) child with a disability who has been found eligible to receive special education and related services. (Ex. 3)
2. The Student started school in the District in the early childhood program, receiving speech and language services. He did not attend school in the District from midway through his kindergarten year until fourth grade. When he returned to the District in fourth grade, he was identified as having a learning disability and a speech and language impairment. (Ex. 3, p. 6; Tr. 78-79, 94-95) The Student currently is a senior in high school in the District.
3. During the 2017-2018 school year, when a junior in high school, the Student was reading at a first grade level. His cognitive functioning is significantly below average and his working memory is an area of significant weakness. (Ex. 6, p. 6; Tr. 78) An assessment of his working memory in December 2015 ranked him at the .1 percentile, meaning he scored below 99.9 % of students his age in working memory. (Ex. 3, p. 4; Tr. 78) The Student's strengths are his strong social and interpersonal skills and very high adaptive behavior functioning. *Id.*
4. In November 2016, a neuropsychological evaluation of the Student was conducted by [Neuropsychologist] at the [Health Clinic] in [City 1], Wisconsin. [Neuropsychologist] diagnosed the Student as having a language disorder, mild neurocognitive disorder secondary to XYY syndrome (which is a rare genetic disorder) and language-based learning disabilities in reading, math, written expression and oral language. [Neuropsychologist] stated that the Student tested below average to borderline in verbal comprehension and verbal intellectual abilities. In addition, he noted that the Student

was receiving special education services under the educational classification of specific learning disability (SLD) and recommended that District staff also consider “the significant impact of his language disorder upon his learning.” (Ex. 7, p. 5) There is no mention of autism spectrum disorder in [Neuropsychologist] report and no evidence that [Neuropsychologist] diagnosed the Student as having autism spectrum disorder.

5. The Student’s pediatrician conducted a “well child visit” of the Student on August 8, 2017. In his notes from that check-up under the heading “Past Medical History,” [Pediatrician] listed “autism spectrum disorder with intellectual impairment” and in another area under the heading “Subjective,” the doctor listed “provisional diagnosis of autism spectrum disorder-mild.” The doctor also stated that “[h]istory was provided by the mother and father.” [Pediatrician] also stated that the Student “has history of intellectual disabilities, specific learning disorder and reading impairment” as well as a diagnosis of XYY syndrome and that “[a]ll of his clinical symptoms and the learning disabilities that he has been having can be explained due to his genetic makeup.” (Ex. 7, p. 1) There are no further details in the pediatrician’s notes about the Student having autism spectrum disorder.
6. In September and October 2017, the Parent called [Special Education Teacher], the Student’s special education teacher, during class time, thereby interrupting her teaching of students. It was [Special Education Teacher] first year of teaching. [Director of Special Education], who is the District’s special education director, school psychologist and [Special Education Teacher] supervisor, directed [Special Education Teacher] not to answer the phone in the classroom during instructional time, which was a directive for all District teachers. (Tr. 84-85, 180-181)
7. During the 2017-2018 school year, the Parent sent numerous emails to [Special Education Teacher], [Director of Special Education] and to the high school principal, [High School Principal]. Often the same email would be sent or copied to all three staff members. (Tr. 81, 85-86) In order to manage the number of communications with the Parent, [Director of Special Education] set up a procedure for responding to the Parent’s emails that entailed [Special Education Teacher] forwarding emails to her supervisor [Director of Special Education] or the appropriate staff member for a response, such as forwarding scheduling or curriculum questions to [High School Principal]. (Tr. 85-86, 181-182) [Special Education Teacher] and [Director of Special Education] did not ignore emails from the Parent, and [Special Education Teacher] never refused to speak with the Student’s parents in person. (Tr. 86, 182)
8. During the 2017-2018 school year, [Special Education Teacher] prepared written progress reports for the Student, and those written progress reports were provided to the Parents, in accordance with the Student’s IEP(s). (Tr. 193-194)
9. In February 2018, the Parent and the District reached a mediated agreement in which the Parent agreed to release certain medical records of the Student’s to the District, including [Neuropsychologist] 2016 neuropsychological evaluation of the Student, and

the District agreed to conduct a special education reevaluation of the Student to determine if he met the disability eligibility criteria for autism. The District also agreed to provide the Parents with a summary of the Student's reading program that [Special Education Teacher] had been implementing during the school year and to have an educational consultant from [XXXXX] conduct a reading assessment of the Student. (Tr. 87, 89, 92-93, 96-97)

10. By letter dated March 1, 2018, the District provided the Parents with a summary of the comprehensive reading program that [Special Education Teacher] was using to teach the Student. (Ex. 5, Tr. 96-97)
11. [Education Consultant], an educational consultant and state-licensed reading specialist, conducted a reading assessment of the Student on March 1, 2018. [Education Consultant] used a variety of diagnostic reading assessments to assess the Student, and she met with the Student and [Special Education Teacher]. Her assessment report described the Student's testing results (at 1<sup>st</sup> and 2<sup>nd</sup> grade level in several areas) and included her academic recommendations. (Ex. 1) [Education Consultant] stated in her report that "[t]he academic instructional strategies outlined by [the Student's] Functional Language Arts teacher ([Special Education Teacher]) are reasonable and appropriate," and she then listed a "few strategies and resources that may already be in practice, but if not, may be of help" to the District in teaching the Student. *Id.* at p. 8.
12. Upon receiving [Education Consultant's] reading assessment report, [Special Education Teacher] reviewed it and then shared it and discussed it with [Special Education Teacher]. [Director of Special Education] also shared the report with members of the Student's IEP team, including the District's speech and language pathologist and [School Psychologist], who conducted an autism assessment of the Student. (Tr. 98)
13. The District contracted with [School Psychologist] to conduct the educational evaluation of the Student in the area of autism. (Tr. 87-88) [School Psychologist] is a licensed school psychologist who has more than 40 years of experience working with students with disabilities, and he has worked with, evaluated or assessed hundreds of students with autism. (Tr. 134-136, 151)
14. The District received the Student's medical records from the Parent in March 2018. After reviewing the reports and learning that the Student had been diagnosed with XYY syndrome, the IEP team determined that it would be appropriate to determine whether the Student met the eligibility criteria for other health impairment (OHI) disability as part of the reevaluation. (Ex. 3, pp. 12-13; Tr. 92-93, 158-159)
15. When evaluating the Student in April 2018, [School Psychologist] observed the Student at school, interviewed the Student at school, had the Parent and two of the Student's teachers complete the Autism Spectrum Rating Scale to gather information about the Student, and he reviewed educational and medical records of the Student. [School

Psychologist] prepared a written summary report of his assessment findings dated April 20, 2018. (Ex. 3, unnumbered pages between pp. 15-16; Tr. 139-144)

16. In completing the Autism Spectrum Rating Scale, the Parent and one of the teachers did not rate the Student at the “very elevated level” or “elevated level” of concern on any scale or category. The Parent rated the Student in the “slightly elevated level” of concern in only two categories and rated the Student in the “average level” or “low level” of concern in nine categories. [School Psychologist] explained how the scales and the ratings are used to identify autism in his written report, and he concluded that the ratings by the Parent and two of the Student’s teachers did not rise to the level of identification for autism and did not meet the required criteria for identifying a child with autism. (Ex. 3, Tr. 148)
17. On April 23, 2018, the District held an IEP team meeting to reevaluate the Student and determine his continuing eligibility for special education and to review and revise his IEP. The following IEP team members participated in the IEP meeting: the Student, the Parent, special education director [Director of Special Education], independent contractor/school psychologist [School Psychologist], special education teacher [Special Education Teacher], the speech and language pathologist, high school principal/local education agency representative [High School Principal], and a regular education teacher of the Student. The District’s attorney also attended the IEP team meeting. (Ex. 3, p. 2)
18. During the April 23 IEP meeting, the IEP team reviewed and considered [School Psychologist] autism evaluation of the Student and the Student’s medical records provided by the Parent. (Ex. 3, p. 5, Tr. 88-89, 93, 149) The IEP team determined that the Student continued to meet the eligibility criteria for the impairment of specific learning disability (SLD) and that he met the criteria for OHI but did not meet the eligibility criteria for autism. (Ex. 3, p. 9) The IEP team completed DPI’s eligibility checklists for autism and OHI and the required documentation form for SLD in reaching the eligibility conclusions. (Ex. 3, pp. 11-15) The Parent agreed with the IEP team’s conclusions regarding the Student’s classification as SLD and OHI, but he disagreed with the team’s determination that the Student did not meet the eligibility criteria for autism. (Ex. 3, p. 9)
19. In reviewing and revising the Student’s IEP at the April 23 IEP meeting, the IEP team reviewed and discussed [Education Consultant’s] reading assessment of the Student. (Ex. 3, pp. 4-5, 17; Tr. 11-12, 100, 178) Based upon [Education Consultant’s] reading assessment, the IEP team revised an annual goal in the Student’s IEP related to functional language arts. (Tr. 101-102, 180) The annual goal was revised in the April 2018 IEP to be more functional and practical in its application so as to be more relevant for the Student, as compared to the functional language arts goal in the Student’s prior IEP from November 2017. (Ex. 3, pp. 22-23; Ex. 6, pp. 8-9; Tr. 104-105)
20. The District ordered the books that [Education Consultant] recommended in her reading assessment report, and [Special Education Teacher] planned to read the books and

incorporate instructional strategies and methodologies from the books in her instruction of the Student. (Tr. 176-178)

## DISCUSSION

### Burden of Proof

The U.S. Supreme Court has ruled that the burden of proof in an administrative hearing challenging an IEP is on the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005). In this case, the burden of proof is on the Parent. The Parent must “cite credible evidence that the choice[s] the school district made cannot be justified.” *Sch. Dist. v. Z.S.*, 184 F.Supp.2d 860, 884 (W.D. Wis. 2001), *aff’d* 295 F.3d 671 (7<sup>th</sup> Cir. 2002).

### Evaluation and Eligibility Determination

The IDEA and Wisconsin special education laws set forth the procedures a school district must follow when evaluating and reevaluating a student for special education. 20 USC §§ 1414(b), 1415; 34 CFR § 300.304; Wis. Stat. § 115.782.

When conducting a special education evaluation, an IEP team must: (1) use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parents and information that is related to enabling the child to be involved in and progress in the general curriculum; (2) use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors; (3) use assessments and other evaluation materials for the purposes for which they are valid and reliable, administered by trained and knowledgeable personnel in accordance with any instructions provided by the producer of the assessment materials; (4) assess the child in all areas of suspected disability; and (5) use tools and strategies that directly assist persons in determining the educational needs of the child. Wis. Stat. § 115.782(2).

In addition, Wisconsin law requires the IEP team to review existing evaluation data on the child, including evaluations and information provided by the parents, previous interventions and the effects of those interventions, current classroom-based, local, or state assessments, classroom-based observations, and observations by teachers and related services providers. *Id.* The IEP team is also required to generate assessment and other evaluation measures to produce information related to the student’s present level of academic achievement and developmental needs of the child. *Id.*

In order to be identified as a child with a disability under the IDEA, an IEP team must determine whether the child meets a two-prong eligibility standard. A child qualifies for special education and related services if: (1) the child is determined to be a child with a disability within one of the listed categories of impairment, and (2) if, by reason of the identified impairment, the child needs or continues to need special education and related services. 20 USC § 1401(3)(A); 34 CFR § 300.8(a)(1).

In Wisconsin, the definition of autism as an educational disability and the criteria for identifying a child as having the educational disability of autism are set forth in Wis. Admin. Code § PI 11.36, as follows:

(a) Autism means a developmental disability significantly affecting a child's social interaction and verbal and nonverbal communication, generally evident before age 3, that adversely affects learning and educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences. The term does not apply if a child's educational performance is adversely affected primarily because the child has an emotional disturbance, as defined in sub. (7).

(b) The results of standardized or norm-referenced instruments used to evaluate and identify a child under this paragraph may not be reliable or valid. Therefore, alternative means of evaluation, such as criterion-referenced assessments, achievement assessments, observation, and work samples, shall be considered to identify a child under this paragraph. Augmentative communication strategies, such as facilitated communication, picture boards, or signing shall be considered when evaluating a child under this paragraph. To identify a child under this paragraph, the criteria under subds. 1. and 2. and one or more criteria under subds. 3. through 6. shall be met.

1. The child displays difficulties or differences or both in interacting with people and events. The child may be unable to establish and maintain reciprocal relationships with people. The child may seek consistency in environmental events to the point of exhibiting rigidity in routines.

2. The child displays problems which extend beyond speech and language to other aspects of social communication, both receptively and expressively. The child's verbal language may be absent or, if present, lacks the usual communicative form which may involve deviance or delay or both. The child may have a speech or language disorder or both in addition to communication difficulties associated with autism.

3. The child exhibits delays, arrests, or regressions in motor, sensory, social or learning skills. The child may exhibit precocious or advanced skill development, while other skills may develop at normal or extremely depressed rates. The child may not follow normal developmental patterns in the acquisition of skills.

4. The child exhibits abnormalities in the thinking process and in generalizing. The child exhibits strengths in concrete thinking while difficulties are demonstrated in abstract thinking, awareness and judgment. Perseverant thinking and impaired ability to process symbolic information may be present.

5. The child exhibits unusual, inconsistent, repetitive or unconventional responses to sounds, sights, smells, tastes, touch or movement. The child may have a visual or hearing impairment or both in addition to sensory processing difficulties associated with autism.

6. The child displays marked distress over changes, insistence on following routines, and a persistent preoccupation with or attachment to objects. The child's capacity to use objects in an age- appropriate or functional manner may be absent, arrested or delayed. The child may have difficulty displaying a range of interests or imaginative activities or both. The child may exhibit stereotyped body movements.  
Wis. Admin. Code § PI 11.36 (8)(a) and (b).

The DPI created a checklist to assist school districts in determining if a child has an impairment in the area of autism under the Wisconsin statutes and the eligibility criteria set forth in Wis. Admin. Code § PI 11.36 (8)(b).

Here, the IEP team assessed the Student in three areas of suspected disability -- autism, SLD and OHI. [School Psychologist], a highly experienced and licensed school psychologist, prepared a summary evaluation report that described his assessment of the Student, and the IEP team reviewed and discussed his report at the April 2018 IEP meeting. A review of the Student's April 2018 IEP and evaluation report shows that the IEP team, including [School Psychologist], conducted the autism assessment and the reevaluation of the Student in accordance with legal requirements for special education evaluations. [School Psychologist] convincingly and credibly testified why he concluded that the Student did not meet the eligibility criteria for autism, consistent with the findings and conclusions in his written evaluation report. (Ex. 3; Tr. 146-150) The IEP team utilized the autism eligibility checklist created by DPI and properly concluded that the Student did not meet the criteria for an impairment in the area of autism under the Wisconsin Administrative Code. (Ex. 3, p. 11)

The Parent presented no evidence showing that the autism evaluation of the Student was not conducted in accordance with the law. With regard to the eligibility determination, the Parent's argument appeared to be that the Student had been medically diagnosed with autism, so the IEP team should have determined that the Student met the criteria for an educational disability in the area of autism. However, based upon the medical records provided to the District by the Parent, [Neuropsychologist] did not diagnose the Student with autism. (Ex. 7) Moreover, even if the Student's pediatrician [Pediatrician] had diagnosed the Student with autism, which is not entirely clear from the medical records, a medical diagnosis of autism does not equate to eligibility for an educational disability in the area of autism. *See Enfield Bd. of Educ.*, 72 IDELR 80 (SEA CT 2018). The Parent failed to meet his burden of showing that the District improperly determined that the Student is not a child with a disability in the area of autism.

#### Reading Specialist's Recommendations in the April 2018 IEP

Under Wisconsin law, an IEP team is required to review a child's IEP to determine whether the annual goals for the child are being achieved and to revise the IEP, as appropriate, to address all of the following:



- a. Any lack of expected progress toward the annual goals and in the general curriculum.
  - b. The results of any reevaluation conducted under Wis. Stat. § 115.782.
  - c. Information about the child provided to or by the child's parents, as described in Wis. Stat. § 115.782.
  - d. The child's anticipated needs.
  - e. Other matters.
- Wis. Stat. § 115.787 (4)(a).

Under the IDEA, an IEP must include “a statement of the special education, related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child.” 34 CFR § 300.320(a)(4). *See also* Wis. Stat. § 115.787(2)(a). However, the IDEA does not require that an IEP identify the specific educational methodologies that the District will use to instruct the child. 71 Fed. Reg. 46,665 (2006); *see also Shakopee Indep. Sch. Dist.*, 52 IDELR 210 (SEA MN 2009).

In this case, members of the IEP team were provided with copies of the reading assessment report prepared by [Education Consultant], the reading specialist. References to the reading assessment were included throughout the IEP, and [Director of Special Education] and [Special Education Teacher] credibly testified that the IEP team reviewed and considered the reading assessment report when reviewing and revising the Student's IEP in April 2018. (Ex. 3, pp. 4-5, 17; Tr. 100, 178) Furthermore, in response to [Education Consultant] reading assessment, the IEP team revised one of the Student's goals related to functional language arts. (Tr. 101-102, 180) [Special Education Teacher] credibly testified that the District obtained the books recommended in [Education Consultant] report and that she planned to read them and incorporate strategies and methodologies from the books in her instruction of the Student.

The District was not legally obligated to include all of the recommendations and methodologies recommended by [Education Consultant] into the Student's IEP. The IEP team properly reviewed and considered the reading assessment, included information from the reading assessment in the April 2018 IEP, and revised one of the Student's goals based upon [Education Consultant] assessment. Moreover, [Education Consultant] stated in her report that the academic instructional strategies outlined by [Special Education Teacher] were reasonable and appropriate, which undercuts the Parent's argument that all of [Education Consultant] recommendations needed to be included in the Student's IEP in order for him to receive a free, appropriate public education. The Parent failed to show that the Student was denied a free, appropriate public education because the District did not incorporate all of [Education Consultant] recommendations into the April 2018 IEP.

#### Communication with the Special Education Teacher

School districts must ensure that parents of a child with a disability are allowed to examine all records related to the child and are allowed to participate in meetings about the identification, evaluation and educational placement of the child, and the provision of a free, appropriate public education to the child. Wis. Stat. § 115.792 (1)(a)1. Districts also must

establish and maintain procedures to ensure that a child's parents are provided prior written notice whenever the district proposes to initiate or change, or refuses to initiate or change, the identification, evaluation or educational placement of the child, or the provision of a free, appropriate public education to the child. Wis. Stat. § 115.792 (1)(b). In addition, an IEP team must include in a child's IEP a statement of when periodic reports on the child's progress towards attaining the annual goals in the IEP will be provided to the child's parents. Wis. Stat. § 115.787(2)(h)2.

The Parent has alleged that, from the beginning of the 2017-18 school year until February 18, 2018, the Student's special education teacher had inadequate communication with the Parent, in violation of special education laws and regulations. [Special Education Teacher] credibly testified that she prepared written progress reports, in accordance with the Student's IEP, that were provided to the Parent. The Parent did not dispute that the special education teacher complied with this legal requirement.

The Parent's argument seemed to relate to the fact that [Special Education Teacher] did not personally respond to all of his emails. [Special Education Teacher] testified that, after receiving phone calls from the Parent during class instructional time and after receiving an increasing amount of emails from the Parent, she was instructed by her supervisor [Director of Special Education] to not answer the telephone in the classroom during instructional time and to forward some of the Parent's emails to [Special Education Teacher] or to the high school principal if they could more appropriately respond to the subject of the email. [Special Education Teacher] further testified that she either responded to the Parent's emails herself or forwarded them on, as directed, and that she was not prohibited from communicating with the Parent.

[Director of Special Education] testified that all teachers are instructed to not answer telephone calls in the classroom during instruction. She further testified that, because the Parent's emails were often sent to multiple staff members and because of the number of emails sent by the Parent, she directed [Special Education Teacher] to forward the Parent's emails to her and to the high school principal for a response. [Director of Special Education] testified that no email from the Parent was ignored and not responded to. The Parent did not dispute that [Director of Special Education] and the high school principal responded to his emails.

The Parent failed to show that the District violated his legal rights by having the District's special education director and high school principal, rather than the special education teacher, respond to his some of his emails. He failed to show that the special education teacher's communication with him was inadequate under the law or violated any of his parental rights under the IDEA and Wisconsin special education law.

All of the arguments presented by the parties were carefully considered by the undersigned administrative law judge. Any arguments and evidence on the record that were not specifically mentioned were determined to not merit comment in the decision.

CONCLUSIONS OF LAW

1. In its April 2018 special education evaluation of the Student, the District properly determined that the Student is not a child with a disability in the area of autism.
2. The District was not legally obligated to incorporate all of the XXXXX reading specialist's recommendations into the Student's April 2018 IEP, and the Student was not denied a free, appropriate public education because all of the recommendations were not included in the IEP.
3. From the beginning of the 2017-18 school year until February 18, 2018, the Student's special education teacher had adequate communication with the Parent, in accordance with special education law and regulations.

ORDER

It is hereby ordered that the due process hearing request in this matter is dismissed.

Dated at Madison, Wisconsin on September 14, 2018.

STATE OF WISCONSIN  
DIVISION OF HEARINGS AND APPEALS  
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By: \_\_\_\_\_  
Sally Pederson  
Administrative Law Judge

**NOTICE OF APPEAL RIGHTS**

APPEAL TO COURT: Within 45 days after the decision of the administrative law judge has been issued, either party may appeal the decision to the circuit court for the county in which the child resides under §115.80(7), Wis. Stats., or to federal district court pursuant to U.S.C. §1415 and 34 C.F.R. §300.512.

A copy of the appeal should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

**The Division will prepare and file the record with the court only upon receipt of a copy of the appeal. It is the responsibility of the appealing party to send a copy of the appeal to the Division of Hearings and Appeals. The record will be filed with the court within 30 days of the date the Division of Hearings and Appeals receives the appeal.**