

Before the
Administrative Hearing Commission
State of Missouri



, in the interest of)	
,)	
)	
Petitioner,)	
)	
vs.)	No. 19-0210
)	
UNIVERSITY ACADEMY CHARTER)	
SCHOOL,)	
)	
Respondent.)	

DECISION

(Mother) filed a due process complaint against University Academy Charter School (University Academy) alleging that University Academy failed to provide special education services to her child, (Student) pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400 et seq. We find University Academy failed to comply with its duty to evaluate a student it had reason to suspect had a disability in violation of 34 C.F.R. §§300.301(c) and 300.111(c)(1). We order University Academy to provide an independent evaluation of Student and undertake corrective actions including compensatory education contingent on the evaluator's findings.

Procedure

On March 1, 2019, Mother filed a due process complaint in the interest of Student against University Academy. We scheduled a pre-hearing conference for March 19, 2019, and a hearing

on the complaint for April 3, 2019. University Academy filed a motion for involuntary dismissal of the complaint on March 14, 2019, which we denied on March 22, 2019. On April 22, 2019, we held a hearing. On May 20, 2019, we resumed the hearing. Mother appeared *pro se*. Attorney Shellie L. Guin represented University Academy. This case became ready for decision on June 14, 2019, when the last written argument was due. On June 17, 2019, University Academy filed a motion to strike portions of Mother's brief. We grant the motion as elaborated below.

Findings of Fact

1. At the time of the hearing, Student was years old. She has medical diagnoses of dyslexia and receptive-expressive language disorder.

2. Student lives with her Mother and Father (Parents) in Kansas City, Missouri. Mother is legally blind, and Father suffers from chronic health issues.

3. Student attended University Academy from August 2018 to May 2019. University Academy is a public charter school in Kansas City, Missouri. As a public charter school, University Academy operates as its own local education agency (LEA).

4. Student was born healthy and met developmental milestones within appropriate time intervals. Student displays good general health, but suffers from year-round allergies. At a young age, Student developed ear infections that may have affected the development of her speech and hearing. Student wears prescription glasses.

Preschool and Kindergarten with Hickman Mills

5. For the 2012-2013 and 2013-2014 school years, Student attended preschool at the Freda Markley Early Childhood Center within Hickman Mills.

6. In April 2012, Student underwent standardized testing through Hickman Mills. Student's test scores revealed deficiencies in the areas of expressive vocabulary, communication, and speech.

7. On May 24, 2012, Student received an educational diagnosis of Young Child with Developmental Delay (YCDD).

8. On May 23, 2013, Hickman Mills conducted an Individualized Education Plan (IEP) meeting and determined that Student still qualified for special education services with an educational diagnosis of YCDD. Additionally, the IEP team noted that Student "made tremendous progress in the area of communication skills" and her "expressive vocabulary has increased dramatically and she continues to add new words weekly."¹

9. For the 2014-2015 school year, Student attended kindergarten at Ervin Learning Center in Hickman Mills. During the school year, Student missed more than 50 school days.

10. In March 2015, Student underwent a series of standardized tests as part of a re-evaluation for special education services.

11. Hickman Mills administered the following tests to Student: Stanford-Binet Intelligence Scale, Fifth Edition (SB-V); Test of Auditory Comprehension of Language – Third Edition (TACL-3); Clinical Evaluation of Language Fundamentals, Preschool – 2nd Edition (CELF P-2); and Wechsler Individual Achievement Test-Third Edition (WIAT-III).

12. Student scored an 83 (13th percentile) on the CELF P-2 in the areas of core language and expressive language. Scores between 85 and 115 are considered average.

13. Student scored an 87 (19th percentile) on TACL-3 quotient. Scores between 90 and 110 are considered average.

¹ Pet'r Ex. 10.

14. On the WIAT-III, Student scored low in early reading skills (1st percentile) and math problem solving (2nd percentile); below average in numerical operations (6th percentile), spelling (4th percentile), written expression (8th percentile), and mathematics (3rd percentile); and average in alphabet writing fluency (27th percentile).

15. Student scored a 100 (50th percentile) full scale IQ on the SB-V indicating average cognitive ability.

16. Additionally, a test of Student's hearing revealed normal hearing function.

17. On June 10, 2019, Student's IEP team issued a written report of its evaluation findings. Student's IEP team found that Student no longer met the eligibility criteria for YCDD due to her age. Further, Hickman Mills determined that it could not determine if Student met the eligibility criteria for a Specific Learning Disability (SLD) because, although her test scores reflected a significant discrepancy between her cognitive ability and academic achievement, Student had 50 absences during the school year and did not present a specific pattern of strengths or weaknesses. Furthermore, the report found that Student "is able to access the core curriculum in the general education setting and navigate the school without the aids of technology."²

Homeschooling

18. For the 2015-2016, 2016-2017, and 2017-2018 school years, Student received a homeschool education.

19. On April 18, 2017, Hickman Mills reevaluated Student for special education services at Parents' request. Student took several tests as part of the evaluation.

20. On the Test of Auditory Comprehension of Language – Fourth Edition (TACL-4), she scored 75 – “low average to below average range.” On the Clinical Evaluation of Language Fundamentals – 5th Edition (CELF 5), she scored 84 – slightly below average. On the WIAT-III,

² Resp. Ex. A.

Student scored “very low” in the areas of reading comprehension and written expression; “low” in total reading, basic reading, and mathematics; and “below average” in math fluency.³

21. Student’s IEP team determined that Student did not meet the eligibility criteria as a child with a disability and did not require the use of assistive technology. The IEP team based its decision, in part, on a “lack of appropriate instruction in reading including the essential components of reading instruction.”⁴

22. As part of Student’s homeschool education, she used an “IXL program” – standardized software used for homeschool work that aligns with Missouri’s and other states’ learning standards. IXL is a supplemental practice program for skills needed at each grade level. IXL contains lessons and reviews of certain concepts that a student would be expected to receive instruction in at school.

23. A printout from the IXL program dated September 2018 shows that Student had completed a total of 42 hours and 7 minutes of third grade reading and 1 hour and 43 minutes of fourth grade reading. The printout indicates Student completed 37 hours and 52 minutes of third grade math and 2 hours and 45 minutes of fourth grade math. The printout did not specify the time frame in which Student completed this instruction.

24. In addition to IXL, Student used textbooks while homeschooled.

Medical Diagnoses

25. On November 2, 2017, Student underwent a comprehensive speech and language evaluation at Children’s Mercy Hospital (Children’s Mercy).

26. Children’s Mercy staff diagnosed Student with receptive and expressive language disorder and dyslexia. Children’s Mercy based its findings on observation of Student, prior

³ Resp. Ex. B.

⁴ *Id.*

academic achievement, and cognitive ability tests administered by Hickman Mills. In a report of its findings, Children's Mercy stated:

Given the finding from this evaluation a diagnosis of dyslexia is appropriate. Dyslexia is a specific learning disability that is neurobiological in origin. It is characterized by difficulties with accurate and/or fluent word recognition and poor spelling and decoding abilities. These difficulties typically result from a deficit in the phonological component of language, that is often unexpected in relation to other cognitive abilities and the provision of effective classroom instruction. Secondary consequences may include problems in reading comprehension and reduced reading experience, that can impede growth of vocabulary and background knowledge.[⁵]

27. The Children's Mercy's report recommended a structured literacy program with specific interventions specified by the International Dyslexia Association. Structured literacy programs use the senses to improve memory and learning of reading and spelling. There are many structured literacy programs available, including: Alphabetic Phonics, Barton, Orton-Gillingham, Slingerland, Sonday, and Wilson.

28. Additionally, Children's Mercy's report lists multiple accommodations to consider for Student's dyslexia, including:

- Additional time for test taking.
- Separate, quiet testing space.
- Providing a reader on classroom assignments on tests for subjects such as science or social studies where her difficulty decoding interferes with reading comprehension.
- Providing textbooks in an audible format.
- Use of text-to-speech and speech-to-text software as appropriate.
- Grading handwritten assignments on content only and do not penalize student for spelling errors.
- Teaching keyboarding to work toward use of computer for writing tasks.
- Allow use of a computer in the classroom and at home for completing writing assignments.

⁵ Resp. Ex. H.

2018-2019 at University Academy

29. On August 18, 2018, University Academy notified Parents that it had accepted Student for enrollment. On Student's application for enrollment, Mother disclosed that Student received special education services at Ervin Early Learning Center.

30. On August 27, 2018, Parents submitted a request for an initial special education evaluation to University Academy. Following the evaluation request, University Academy asked Parents to provide Student's prior education records for Hickman Mills and homeschool and medical records. Parents provided University Academy with records of Hickman Mills' three evaluations, medical records from Children's Mercy, and the September 2018 IXL printout.

31. On September 11, 2018, University Academy refused Parents' request for an initial evaluation because Student "has not been observed in an educational setting. There is not enough evidence for the team to suspect a disability under IDEA."⁶ Specifically, University Academy based this finding on current records, parent input, homeschool information, Children's Mercy's report, Hickman Mills' Evaluation Report, attendance, current grade check, and staff input.

32. Following University Academy's notice of action, Mother contacted Amy Bellman, University Academy's special education coordinator. Bellman informed Mother that University Academy needed to observe Student for at least six months before an evaluation would be appropriate. Bellman's primary concern in refusing to evaluate Student was the possibility that she had not received appropriate instruction in homeschool.

33. During her first semester, student received one-on-one instruction with University Academy's reading specialist, Jennifer Redmond. One-on-one instruction became less frequent

⁶ Resp. Ex. L.

in the second semester. Redmond has training in Orton-Gillingham instruction for students with dyslexia, and she used Orton-Gillingham with Student.

34. On January 15, 2018, Parents submitted a second written request for an initial evaluation to University Academy.

35. On February 12, 2019, University Academy issued a notice of action refusing Parents' request for an initial evaluation because Student "was previously found not eligible due to the lack of instruction. Now with provided instruction in reading and math, she is making significant progress. With this rate of progress, there is not enough evidence for the team to suspect a disability under IDEA."⁷

36. On March 26, 2019, during the pendency of Mother's due process complaint, University Academy offered to conduct an initial evaluation, but maintained it had "no reason to suspect a qualifying disability."⁸

37. University Academy periodically tested Student's reading capabilities using Fountas & Pinnell Assessments. Fountas & Pinnell Assessments measure reading on a letter scale: letters A-D correspond to Kindergarten; letters E-I correspond to first grade; letters J-M correspond to second grade; letters N-P correspond to third grade; letters Q-T correspond to fourth grade.

38. In August, Student scored a B (early kindergarten) level on her reading assessment.

39. In October, Student scored a D (end of kindergarten) level on her reading assessment.

40. In December, Student scored an E (beginning of first grade) level on her reading assessment.

⁷ Resp. Ex. S.

⁸ Resp. Ex. FF.

41. In March, Student scored a G (middle of first grade) level on her reading assessment.

42. University Academy tested Student periodically in math using “Study Island” benchmark assessments for third grade. Study Island benchmarks are scored using a scale of Advanced, Proficient, Basic, and Below Basic.

43. University Academy tested Student’s math achievement in the areas of operations and algebraic thinking, numbers and operations in base ten, numbers and operations of fractions, and measurement and data in October 2018, February 2019, and March 2019. In each area on each test, Student scored Below Basic.

44. University Academy records student attendance as a percentage of school days attended. As of November 12, 2018, Student had an attendance percentage of 82.03%; her peers in the same grade had an attendance percentage of 96.52%.

45. By the end of the first semester, Student’s attendance improved to 87.92%.

Conclusions of Law

This Commission has jurisdiction over due process complaints with respect to any matter relating to the identification, evaluation, educational placement, or provision of a free appropriate public education (FAPE) for a child in this state.⁹ Mother must prove her case by a preponderance of the evidence.¹⁰ A preponderance of the evidence is “evidence which as a whole shows the fact to be proved [is] more probable than not.”¹¹ We must judge the credibility of witnesses, as well as the weight and value of the evidence.¹² We have the discretion to believe all, part, or none of the testimony of any witness.¹³

⁹ Section 162.961.1, RSMo 2016.

¹⁰ *Tate v. Dep’t of Social Services*, 18 S.W.3d 3, 8 (Mo. App. E.D. 2000).

¹¹ *State Bd. of Nursing v. Berry*, 32 S.W.3d 638, 642 (Mo. App. W.D. 2000).

¹² *Faenger v. Petty*, 441 S.W.3d 199, 204 (Mo. App. W.D. 2014).

¹³ *Dorman v. State Bd. of Registration for the Healing Arts*, 62 S.W.3d 446, 455 (Mo. App. W.D. 2001).

Evidentiary Issues

At the hearing, we took University Academy's objections to Mother's Exhibit 4 with the case. Exhibit 4 is a printout of Student's progress and improvement in the IXL program dated April 2019. University academy objects on the grounds that Exhibit 4 is cumulative and was not submitted five days prior to the hearing. Substantively, Exhibit 4 contains the same information as University Academy's Exhibit LL, but reflects slightly more hours of study because Student continued to use the IXL program after September 2018. Mother did not disclose Exhibit 4 until April 19, 2018 – less than five days before the hearing. Therefore, we sustain University Academy's objection.¹⁴

Additionally, University Academy moved to strike portions of Mother's closing statement and portions of Mother's proposed findings of fact, conclusions of law, and decision. It is true that Mother raised factual allegations not presented at the hearing. We grant University Academy's motion to strike. We base our decision on the evidence in the record.¹⁵

Issues of the Case

Mother alleges University Academy has failed to provide FAPE as required by the IDEA. Specifically, Mother alleges that Student was denied FAPE because University Academy failed to identify Student as eligible for special education services and placed Student in a lower grade classroom.

The IDEA requires each state's department of education to actively identify, locate, and evaluate children with disabilities.¹⁶ This "child find" requirement extends to students who are suspected of having a disability, despite progressing from grade to grade.¹⁷ The IDEA requires

¹⁴ State Plan for Special Education (2017) (State Plan), Title V, § H, subsection titled "State-Level Due Process Hearings," (2)(d).

¹⁵ *Hartley v. Spring River Christian Village*, 941 S.W.2d 4, 7 (Mo. App. S.D. 1997).

¹⁶ 20 U.S.C. § 1412(a)(3)(A); *Bd. of Educ. of Wappingers Cent. Sch. Dist. v. M.N. on Behalf of J.N.*, No. 16-CV-09448(TPG), 2017 WL 4641219, at *6 (S.D.N.Y. Oct. 13, 2017).

¹⁷ 34 C.F.R. § 300.111(c)(1).

University Academy to conduct an initial evaluation in which it assesses “all areas of suspected disability.”¹⁸ This assessment must consider available diagnoses, health history, and specific health needs necessary to assist a child in school.¹⁹ A failure to diagnose a disability does not constitute a FAPE violation per se – especially in the case of ailments that are difficult to diagnose.²⁰ However, there is an inferred requirement that schools identify disabled children within a reasonable time after notice of behavior that likely indicates a disability.²¹ There is no specific time at which a school’s failure to identify a disability becomes unreasonable, but if it fails to do so, it necessarily denies FAPE.²²

The IDEA inexplicitly covers grade placement and retention as a provision of FAPE. Under the IDEA, all children with recognized disabilities are entitled to FAPE designed to meet their unique needs.²³ Missouri’s State Plan for Special Education (2017) (State Plan) generally defines FAPE as regular and specialized special education and related services provided at public expense, under public supervision and direction without charge to the parents that meet the educational standards of the state educational agency and are provided in conformity with the Student’s IEP.²⁴ The IDEA does not prescribe any substantive standard regarding the level of education a disabled child should be accorded.²⁵ It does require the school district to “provide a disabled child with such special education and related services ‘in conformity with the [child’s] individual education program.’”²⁶ “To meet its substantive obligations under the IDEA” an IEP must be “reasonably calculated to enable a child to make progress appropriate in light of the

¹⁸ 21 U.S.C. §§ 1414(a)(1)(A), (b)(3)(B).

¹⁹ See *L.J. by & through Hudson v. Pittsburg Unified Sch. Dist.*, 850 F.3d 996, 1008 (9th Cir. 2017).

²⁰ *D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 249 (3rd Cir. 2012).

²¹ *Todd by Todd v. Elkins Sch. Dist. No. 10*, 105 F.3d 663 (8th Cir. 1997), citing *W.B. v. Matula*, 67 F.3d 484, 501 (3d Cir. 1995).

²² *Bd. of Educ. of Wappingers Cent. Sch. Dist.* at *7.

²³ 20 U.S.C. §1400(d)(1)(A) and 34 C.F.R. §300.1(a).

²⁴ State Plan, Regulation I, page 3.

²⁵ *Board of Education of Hendrick Hudson Central Sch. Dist., Westchester County v. Rowley*, 458 U.S. 176 (1982).

²⁶ *Andrew F. v. Douglas County Sc. Dist. RE-1*, 137 S. Ct. 988, 994 (2017).

child’s circumstances.”²⁷ This is not a bright-line rule, and it “requires a prospective judgment by school officials” that is a “fact-intensive exercise” incorporating information from both school officials and the child’s parents.²⁸ Therefore, if Student qualifies for special education services, we may consider whether the provisions of FAPE directly impact her retention or promotion from grade to grade.²⁹

Initial Evaluations

Before a student may receive special education and related services, the public agency must conduct an initial evaluation.³⁰ A parent may request an initial evaluation for special education services.³¹ If the public agency does not suspect the student has a disability, it may refuse the parent’s evaluation request with written notice to parents.³² The content of this notice must state the reasons for the refusal and the factors considered in making that determination.³³

This case involves two separate requests and refusals for an initial evaluation: one at the beginning of each semester Student attended University Academy. For both requests, University Academy complied with the IDEA’s procedural requirements for refusal. Therefore, we examine the substantive basis for University Academy’s refusal to evaluate student. Furthermore, “child find” represents an ongoing obligation with which University Academy must comply in the absence of a parental request.³⁴ As such, we also consider University Academy’s ongoing failure to evaluate after refusing to evaluate Student in February 2019.

These considerations share a common set of legal principles related to the diagnosis of students under the IDEA. Mother seeks special education services on the basis of Student’s

²⁷ *Id.* at 999.

²⁸ *Id.*, citing *Rowley*, 458 U.S. at 207.

²⁹ See *Letter to Anonymous*, 35 IDELR 35 (OSEP 2000).

³⁰ 34 C.F.R. § 300.301(a).

³¹ 34 C.F.R. § 300.301(b).

³² 34 C.F.R. § 300.503(a)(2).

³³ 34 C.F.R. § 300.503(b).

³⁴ *Indep. Sch. Dist. No. 413, Marshall v. H.M.J. ex rel. A.J., M.N.*, 123 F. Supp. 3d 1100, 1108 (D. Minn. 2015).

medical diagnoses of dyslexia and receptive-expressive language disorder. With these diagnoses, a student may qualify for special education services under the educational diagnosis of SLD. SLD means:

a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which may manifest itself in an imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations. The term includes such conditions as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. The term does not include learning problems that are primarily the result of a visual, hearing, or motor disability; intellectual disability; emotional disturbance; cultural factors; environmental or economic disadvantage; or, limited English proficiency.

A child has a specific learning disability when:

(1) **The child does not achieve adequately for the child's age or to meet State approved grade level standards** in one or more of the following areas, when provided with learning experiences and instruction appropriate for the child's age or State approved grade-level standards:

- a. Oral Expression
- b. Listening Comprehension
- c. Written Expression
- d. Basic Reading Skill
- e. Reading Fluency Skills
- f. Reading Comprehension
- g. Mathematics Calculation; and,
- h. Mathematics Problem Solving

(2) **The child does not make sufficient progress** to meet age or State approved grade-level standards in one or more of the areas identified in A above **when using a process based on the child's response to scientific, research-based intervention; or the child exhibits a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, State approved grade-level standards, or intellectual development, that is determined by the group to be relevant to the identification of a specific learning disability, using appropriate assessments, consistent with 34 CFR 300.307-300.311.** A pattern of strengths and weaknesses is defined as a severe discrepancy between achievement and intellectual ability of at least 1.5 standard deviations; and,

(3) The group determines that its findings under A and B of this section are not primarily the result of:

- a. A visual, hearing, or motor disability;
- b. Intellectual disability;
- c. Emotional disturbance;
- d. Cultural factors;
- e. Environmental or economic disadvantage;
- f. Limited English Proficiency;
- g. **Lack of appropriate instruction in reading, including the essential components of comprehensive literacy instruction (as defined in section 2221(b)(1) of the ESEA);**
- h. **Lack of appropriate instruction in math; and,**

(4) To ensure that underachievement in a child suspected of having a specific learning disability is not due to lack of appropriate instruction in reading or math, the group must consider, as part of the evaluation:

a. Data that demonstrate that prior to or as part of the referral process, the child was provided appropriate instruction in regular education settings, delivered by qualified personnel, and

b. Data-based documentation of repeated assessments of achievement at reasonable intervals, reflecting formal assessment of student progress during instruction, which was provided to the child's parents.^[35]

By age ten, Student should have reached fourth grade academic standards. During her first months at University Academy, she read at a kindergarten level, and her math scores universally rated “Below Basic” under third grade standards. While she made progress at University Academy and advanced to first grade level reading, she still failed to meet state standards relative to her age. She therefore meets the criteria outlined in subsections (1) and (2) for SLD. Therefore, we evaluate University Academy’s failure to evaluate under the criteria of subsections (3) and (4).³⁶

³⁵ State Plan, Title III, § B page 27-29. Emphasis added.

³⁶ See also 34 C.F.R. § 300.309(b)(1) and (2).

September Notice of Action

On September 11, 2018, University Academy refused Parents' request for an initial evaluation because Student "has not been observed in an educational setting. There is not enough evidence for the team to suspect a disability under IDEA."³⁷ Specifically, University Academy based this finding on current records, parent input, homeschool information, Children's Mercy's report, Hickman Mills' Evaluation Report, attendance, current grade check, and staff input.

Federal Regulation 34 C.F.R. § 300.309(b) provides:

To ensure that underachievement in a child suspected of having a specific learning disability is not due to lack of appropriate instruction in reading or math, the group must consider, as part of the evaluation described in §§300.304 through 300.306—

- (1) Data that demonstrate that prior to, or as a part of, the referral process, the child was provided appropriate instruction in regular education settings, delivered by qualified personnel; and
- (2) Data-based documentation of repeated assessments of achievement at reasonable intervals, reflecting formal assessment of student progress during instruction, which was provided to the child's parents.

University Academy "must" consider these data points and documentation in conducting an evaluation for special education. Consequently, we cannot find a violation of FAPE if that data did not exist, Parents did not make said data available, or the data available reflects a deficiency of appropriate instruction.

Prior to enrolling at University Academy, Student had not attended school in a regular education setting for three years. Mother educated Student at home using textbooks and IXL software. Although Mother used educational software designed to match Missouri's grade standards, the records she provided only reflect approximately 40 hours of instruction in reading

³⁷ Resp. Ex. L.

and math, respectively. By law, homeschooled students in Missouri shall receive at least 600 hours of instruction in reading, language arts, mathematics, social studies, science, and related courses. Mother did not present evidence of her qualifications or any additional instruction beyond the use of unspecified textbooks.³⁸

In March of 2015 and April of 2017, Student took a battery of tests that reflected substandard achievement in math and reading. Student received no such achievement assessment in 2016. Given the lack of data and documentation available to University Academy, we find that University Academy did not deny Student FAPE by refusing to evaluate her in September 2018.

January Notice of Action and Second Semester

On February 12, 2019, University Academy issued a notice of action refusing Parents' request for an initial evaluation because Student "was previously found not eligible due to the lack of instruction. Now with provided instruction in reading and math, she is making significant progress. With this rate of progress, there is not enough evidence for the team to suspect a disability under IDEA."³⁹

Approximately six months had passed since Student enrolled at University Academy – meeting the stated timeline under which University Academy admitted an evaluation may become appropriate. After a semester of education in a regular classroom setting and supplemental instruction by a reading specialist with Orton-Gillingham training, Student's reading progressed from kindergarten to first grade level. University Academy relies heavily on this progress to demonstrate that Student's underachievement stemmed from inappropriate instruction. But Student's progress does little to abate a suspicion that Student may have an educational disability. Given Student's age and the focused instruction she received at

³⁸ Section 167.031.2(2)(b), RSMo 2016.

³⁹ Resp. Ex. S.

University Academy, we would expect that she would show noticeable improvements. It should surprise no one that a dyslexic ten year old who may not have received adequate instruction for three years would improve slightly less than one grade level over a semester and one month after receiving daily one-on-one instruction with Orton-Gillingham (a noted modality for students with dyslexia).

Furthermore, the record patently disproves University Academy's stated reason for denying evaluation insofar as it pertains to math. Categorically, student failed to improve in math as measured by Study Island benchmarks used by University Academy. This contradiction illustrates a failure to consider "data-based documentation of repeated assessments of achievement" – a stated factor for determining if a student has an SLD.⁴⁰ At the hearing, University Academy presented testimony that attendance factors disproportionately affected Student's math instruction. Ordinarily, we may find absences pertinent to determining whether Student's underachievement stems from a lack of instruction.⁴¹ However, since University Academy previously took the position that Student had made "significant progress" in math when she had not, we give this testimony no credibility.

The IDEA seeks to provide services "reasonably calculated to enable a child to make progress appropriate *in light of the child's circumstances*."⁴² In this case, the Student possesses average cognitive abilities, but severely lags behind in academic achievement. Even if Student's underperformance stems partially from a lack of appropriate instruction while homeschooled, that does not disqualify her from SLD under the State Plan because that may not be the "primary" factor of her underperformance. Given Student's medical diagnoses, unimpressive progress in reading, and failure to progress in math, we find that University Academy had at least

⁴⁰ 34 C.F.R. § 300.309(b)(2).

⁴¹ See *Antioch Unified School District*, Case No. 2018050541 119 LRP 324 (December 28, 2018).

⁴² *Engler F.*, 137 S.Ct. at 999 (emphasis added).

cause to suspect Student may have a disability under the IDEA, and violated its duties under 34 C.F.R. §§ 300.301(c) and 300.111(c)(1).

Subsequent Behavior by University
Academy and Effect of Violations

A child find violation does not necessarily result in a denial of FAPE. Some circuits have held the failure by a school to evaluate a student suspected of having a disability amounts to a procedural violation of the IDEA.⁴³ Procedural violations only result in a denial of FAPE if the violation “compromised the pupil's right to an appropriate education.”⁴⁴ The two specific situations in which this occurs are when a procedural violation results in a loss of educational opportunity or when the parent is denied the opportunity to participate meaningfully in the IEP formulation process.⁴⁵ The failure to frame IEP issues and pertinent facts may compromise the parent’s ability to participate.⁴⁶

The Eighth Circuit has not affirmatively taken this position.⁴⁷ Instead, it evaluates child find violations under a “harmless error” standard.⁴⁸ Under this standard, the fact that a student was subsequently evaluated is relevant to, but not dispositive of, the issue.⁴⁹ Under either standard, we must consider the issue of University Academy’s offer to evaluate Student in March 2019.

On March 26, 2019, during the pendency of Mother’s due process complaint, University Academy offered to conduct an initial evaluation, but Parents refused to consent. However,

⁴³ *D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 249 (3d Cir. 2012).

⁴⁴ *Sch. Bd. of Indep. Sch. Dist. No. 11 v. Renollett*, 440 F.3d 1007, 1011 (8th Cir. 2006).

⁴⁵ See *Timothy O. v. Paso Robles Unified Sch. Dist.*, 822 F.3d 1105, 1112 (9th Cir. 2016).

⁴⁶ See *M.M. v. Lafayette Sch. Dist.*, 767 F.3d 842, 856 (9th Cir. 2014) (the failure to provide parents with a complete data set from tests on their autistic child prevented them from meaningfully participating in the IEP process). *Id.*, as amended (Oct. 1, 2014).

⁴⁷ *Indep. Sch. Dist. No. 413, Marshall v. H.M.J. ex rel. A.J., M.N.*, 123 F. Supp. 3d 1100, 1111 (D. Minn. 2015)

⁴⁸ *Id.*

⁴⁹ *R.M.M. by & through Morales v. Minneapolis Pub. Sch.*, No. 15-CV-1627 (SRN/HB), 2016 WL 475171, at *16 (D. Minn. Feb. 8, 2016) (“the fact that [student] was eventually identified and evaluated does not render [parent’s] child-find claims moot”).

University Academy maintained it had “no reason to suspect a qualifying disability” in its written offer to evaluate. Effectively, this offer amounted to nothing more than a hollow gesture by University Academy after Parents’ trust had eroded. Student still has not received an evaluation under the IDEA. Therefore, we find that University Academy’s violations of 34 C.F.R. §§ 300.301(c) and 300.111(c)(1) resulted in a loss of educational opportunity and did not constitute harmless error. University Academy denied Student FAPE.

Grade Retention

With respect to Mother’s claim regarding Student’s placement in the third grade, we find that this placement did not deny Student FAPE. Although University Academy deprived Student of an evaluation and Parents of the opportunity for an evaluation, the record reflects that Student would not benefit from a more advanced classroom placement.

Remedies

We have broad discretion to offer equitable relief to compensate Student for University Academy’s denial of FAPE. With respect to University Academy’s child find violation, the right to compensatory education accrues at the point when it should have known that Student was receiving an inappropriate education.⁵⁰ Because Student has not received an evaluation since enrolling in University Academy, we order University Academy to provide Student an independent educational evaluation conducted by a qualified evaluator of Parents’ choosing. If Parents lack familiarity with qualified evaluators, University Academy shall provide a list of ten qualified evaluators within the Kansas City metropolitan area. The evaluator shall determine whether Student meets the criteria for an SLD. If the evaluator determines that Student qualifies as a student with an SLD, University Academy shall adopt those findings and develop an IEP for Student. Also contingent on the evaluator’s finding that Student qualifies for and educational

⁵⁰ *D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 249 (3d Cir. 2012).

diagnosis of an SLD, University Academy shall provide for three months of compensatory instruction in reading and math in modalities recommended by the evaluator.

Summary

We find that University Academy failed to comply with its duty to evaluate a student it had reason to suspect had a disability in violation of 34 C.F.R. §§ 300.301(c) and 300.111(c)(1). We order remedies as described in this decision.

SO ORDERED on June 20, 2019.

SREENIVASA RAO DANDAMUDI
Commissioner

Appeal Procedure

Please take notice that this is a final decision of the Administrative Hearing Commission and you have a right to request review of this decision. Per §162.962, when a review of this decision is sought, either party may appeal as follows:

- (1) The court shall hear the case without a jury and shall:
 - (a) Receive the records of the administrative proceedings;
 - (b) Hear additional evidence at the request of a party; and
 - (c) Grant the relief that the court determines to be appropriate, basing its decision on the preponderance of the evidence;
- (2) Appeals may be taken from the judgment of the court as in other civil cases;
- (3) Judicial review of the administrative hearing commission's decision may be instituted by filing a petition in a state or federal court of competent jurisdiction. Appeals to state court shall be filed within forty-five days after the receipt of the notice of the agency's final decision;
- (4) Except when provided otherwise within this chapter or Part 300 of Title 34 of the Code of Federal Regulations, the provisions of chapter 536 are applicable to special education due process hearings and appeal of same;

(5) When a commissioner renders a final decision, such decision shall not be amended or modified by the commissioner or administrative hearing commission.

The right to appeal is also addressed in 34 C.F.R. §300.516.