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SPECIAL EDUCATION LEGAL UPDATE: NEW STATUTES, RULES AND CASES

MASE

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I. RECENT STATUTE AND RULE CHANGES EFFECTING SPECIAL EDUCATION

A. Minnesota Law.

➤ Minn. Stat. § 125A.56

Subdivision 1. **Requirement.** (a) Before a pupil is referred for a special education evaluation, the district must conduct and document at least two instructional strategies, alternatives, or interventions using a system of scientific, research-based instruction and intervention in academics or behavior, based on the pupil's needs, while the pupil is in the regular classroom. The pupil's teacher must document the results. A special education evaluation team may waive this requirement when it determines the pupil's need for the evaluation is urgent. This section may not be used to deny a pupil's right to a special education evaluation.

NOTE: These materials and the corresponding presentation are intended to inform you of interesting and important legal developments. While current as of the date of presentation, the information given today may be superseded by court decisions and legislative amendments. We cannot render legal advice without an awareness and analysis of the facts of a particular situation. If you have questions about the application of concepts discussed in the presentation or addressed in this outline, you should consult your legal counsel. ©2009

(b) A school district shall use alternative intervention services, including the assurance of mastery program under section 124D.66, the supplemental early education program under section 124D.081, or an early intervening services program under subdivision 2 to serve at-risk pupils who demonstrate a need for alternative instructional strategies or interventions.

Subd. 2. **Early intervening services program.** (a) A district may meet the requirement under subdivision 1 by establishing an early intervening services program that includes:

(1) a system of valid and reliable general outcome measures aligned to state academic standards that is administered at least three times per year to pupils in kindergarten through grade 8 who need additional academic or behavioral support to succeed in the general education environment. The school must provide interim assessments that measure pupils' performance three times per year and implement progress monitoring appropriate to the pupil. For purposes of this section, "progress monitoring" means the frequent and continuous measurement of a pupil's performance that includes these three interim assessments and other pupil assessments during the school year. A school, at its discretion, may allow pupils in grades 9 through 12 to participate in interim assessments;

(2) a system of scientific, research-based instruction and intervention; and

(3) an organizational plan that allows teachers, paraprofessionals, and volunteers funded through various sources to work as a grade-level team or use another configuration across grades and settings to deliver instruction. The team must be trained in scientific, research-based instruction and intervention. Teachers and paraprofessionals at a site operating under this paragraph must work collaboratively with those pupils who need additional academic or behavioral support to succeed in a general education environment.

(b) As an intervention under paragraph (a), clause (2), staff generating special education aid under section 125A.76 may provide small group instruction to pupils who need additional academic or behavioral support to succeed in the general education environment. Small group instruction that includes pupils with a disability may be provided in the general education environment if the needs of the pupils with a disability are met, consistent with their individual education plans, and all pupils in the group receive the same level of instruction and make the same progress in the instruction or intervention. Teachers and paraprofessionals must ensure that the needs of pupils with a disability participating in small group instruction under this paragraph remain the focus of the instruction. Expenditures attributable to the time special education staff spends providing instruction to nondisabled pupils in this circumstance is eligible for special education aid under section 125A.76 as an incidental benefit if:

(1) the group consists primarily of disabled pupils;

(2) no special education staff are added to meet nondisabled pupils' needs; and

- (3) the primary purpose of the instruction is to implement the individual education plans of pupils with a disability in this group. Expenditures attributable to the time special education staff spends providing small group instruction to nondisabled pupils that affords more than an incidental benefit to such pupils is not eligible for special education aid under section 125A.76, except that such expenditures may be included in the alternative delivery initial aid adjustment under section 125A.78 if the district has an approved program under section 125A.50. During each 60-day period that a nondisabled pupil participates in small group instruction under this paragraph, the pupil's progress monitoring data must be examined to determine whether the pupil is making progress and, if the pupil is not making progress, the pupil's intervention strategies must be changed or the pupil must be referred for a special education evaluation.

➤ **Minn. R. 3525.1341, Subp. 2.** Criteria [to determine qualification for a specific learning disability].

The new SLD Rule incorporates a student's inability to respond to educational interventions as a new basis for qualifying under SLD for special education services. The new rule provides:

A child is eligible and in need of special education and related services for a specific learning disability when the child meets the criteria in items A, B, and C or in items A, B, and D. Information about each item must be sought from the parent and must be included as part of the evaluation data. The evaluation data must confirm that the effects of the child's disability occur in a variety of settings. The child must receive two interventions, as defined in Minnesota Statutes, section 125A.56, prior to evaluation, unless the parent requests an evaluation or the IEP team waives this requirement because it determines the child's need for an evaluation is urgent.

A. The child does not achieve adequately in one or more of the following areas: oral expression, listening comprehension, written expression, basic reading skills, reading comprehension, reading fluency, mathematics calculation, or mathematical problem solving, in response to appropriate classroom instruction, and either:

- (1) the child does not make adequate progress to meet age or state-approved grade-level standards in one or more of the areas listed above when using a process based on the child's response to scientific, research-based intervention (SRBI); or

- (2) 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.

The performance measures used to verify this finding must be representative of the child's curriculum or useful for developing instructional goals and objectives.

Documentation is required to verify this finding. Such documentation includes evidence of low achievement from the following sources, when available: cumulative record reviews; classwork samples; anecdotal teacher records; statewide and district-wide assessments; formal, diagnostic, and informal tests; curriculum-based evaluation results; and results from targeted support programs in general education.

B. The child has a disorder in one or more of the basic psychological processes which includes an information processing condition that is manifested in a variety of settings by behaviors such as inadequate: acquisition of information; organization; planning and sequencing; working memory, including verbal, visual, or spatial; visual and auditory processing; speed of processing; verbal and nonverbal expression; transfer of information; and motor control for written tasks.

C. The child demonstrates a severe discrepancy between general intellectual ability and achievement in one or more of the following areas: oral expression, listening comprehension, written expression, basic reading skills, reading comprehension, reading fluency, mathematics calculation, or mathematical problem solving. The demonstration of a severe discrepancy shall not be based solely on the use of standardized tests. The group shall consider these standardized test results as only one component of the eligibility criteria. The instruments used to assess the child's general intellectual ability and achievement must be individually administered and interpreted by an appropriately licensed person using standardized procedures. For initial placement, the severe discrepancy must be equal to or greater than 1.75 standard deviations below the mean of the distribution of difference scores for the general population of individuals at the child's chronological age level.

D. The child demonstrates an inadequate rate of progress. Rate of progress is measured over time through progress monitoring while using intensive SRBI, which may be used prior to a referral, or as part of an evaluation for special education. A minimum of 12 data points are required from a consistent intervention implemented over at least seven school weeks in order to establish the rate of progress. Rate of progress is inadequate when the child's:

- (1) rate of improvement is minimal and continued intervention will not likely result in reaching age or state-approved grade-level standards;
- (2) progress will likely not be maintained when instructional supports are removed;
- (3) level of performance in repeated assessments of achievement falls below the child's age or state-approved grade-level standards; and
- (4) level of achievement is at or below the fifth percentile on one or more valid and reliable achievement tests using either state or national comparisons. Local comparison data that is valid and reliable may be used in addition to either state or national data. If local comparison data is used and differs from either state or national data, the group must provide a rationale to explain the difference.

➤ **Minn. Stat. § 125A.13.**

(a) Nothing in this chapter must be construed as preventing parents of a child with a disability from sending the child to a school of their choice, if they so elect, subject to admission standards and policies adopted according to sections 125A.62 to 125A.64 and 125A.66 to 125A.73, and all other provisions of chapters 120A to 129C.

(b) The parent of a student with a disability not yet enrolled in kindergarten and not open enrolled in a nonresident district may request that the resident district enter into a tuition agreement with the nonresident district if:

(1) the child is enrolled in a Head Start program or a licensed child care setting in the nonresident district; and

(2) the child can be served in the same setting as other children in the nonresident district with the same level of disability.

➤ **Minn. Stat. § 125A.75**

Subd. 9. Litigation costs; annual report. (a) By November 30 of each year, a school district must annually report the district's special education litigation costs, including attorney fees and costs of due process hearings, to the commissioner of education, consistent with the Uniform Financial Accounting and Reporting Standards.

(b) By January 15 of each year, the commissioner shall report school district special education litigation costs to the house of representatives and the senate committees having jurisdiction over kindergarten through grade 12 education finance.

B. Federal Law.

➤ **ADA Amendments Act of 2008 - (Sec. 4)** Amends the Americans with Disabilities Act of 1990 (ADA) to redefine the term "disability," including by defining "major life activities" and "being regarded as having such an impairment."

The new statute sets forth rules of construction regarding the definition of "disability," including that:

(1) such term shall be construed in favor of broad coverage of individuals under the Act;

(2) the definition of the major life activities that can be impacted by a physical or mental impairment has been considerably broadened by the new act

(3) an impairment that substantially limits one major life activity need not limit other major life activities in order to be a disability;

(4) an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active; and

(5) the determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of specified mitigating measures. (exception is made for glasses/contacts)

➤ **34 CFR 300.300(b)(4).** New rule provides:

If, at any time subsequent to the initial provision of special education and related services, the parent of a child revokes consent in writing for the continued provision of special education and related services, the public agency—

- (i) May not continue to provide special education and related services to the child, but must provide prior written notice in accordance with Sec. 300.503 before ceasing the provision of special education and related services;
- (ii) May not use the procedures in subpart E of this part (including the mediation procedures under Sec. 300.506 or the due process procedures under Sec. Sec. 300.507 through 300.516) in order to obtain agreement or a ruling that the services may be provided to the child;
- (iii) Will not be considered to be in violation of the requirement to make FAPE available to the child because of the failure to provide the child with further special education and related services; and (iv) Is not required to convene an IEP Team meeting or develop an IEP under Sec. Sec. 300.320 and 300.324 for the child for further provision of special education and related services.

➤ **34 CFR 300.9** Amendment to rule clarifies that “consent” means that—

- (a) The parent has been fully informed of all information relevant to the activity for which consent is sought, in his or her native language, or other mode of communication;
- (b) The parent understands and agrees in writing to the carrying out of the activity for which his or her consent is sought, and the consent describes that activity and lists the records (if any) that will be released and to whom; and
- (c)(1) The parent understands that the granting of consent is voluntary on the part of the parent and may be revoked at anytime. (2) If a parent revokes consent, that revocation is not retroactive (i.e., it does not negate an action that has occurred after the consent was given and before the consent was revoked). (3) *If the parent revokes consent in writing for their child's receipt of special education services after the child is initially provided special education and related services, the public agency is not required to amend the child's education records to remove any references to the child's receipt of special education and related services because of the revocation of consent.*

(emphasis added)

II. STUDENT SEARCHES – NO DIMISHED RIGHTS FOR SPECIAL EDUCATION

STUDENTS: *Hough v. Shakopee Public Schools, et. al.*, __ F. Supp.2d __, 2009 WL 873507 (D. Minn. Mar. 30, 2009).

- A. Facts:** Plaintiffs were students who lived in the Shakopee School District and attended Setting IV programs that were run by Minnesota River Valley Special Education Cooperative (“MRVSEC”). Plaintiffs alleged that every student was searched virtually every day when he or she arrived at the MRVSEC Setting IV program. Generally speaking, students had their backpacks and purses searched, and students were required to empty their pockets, remove their shoes and socks, turn down the waistband of their pants, and sometimes submit to a “patdown” search.
- B. Claims:** Plaintiffs alleged that the searches violated their right to be free from unreasonable searches under the Fourth Amendment. They also alleged that the searches constituted disability discrimination in violation of the ADA, Section 504, and the Minnesota Human Rights Act.
- C. Holding:** The court allowed the claims against MRVSEC to proceed to trial, but the court dismissed the claims against the Shakopee School District.
1. *When are searches permissible?* Quoting from the U.S. Supreme Court’s decision in *New Jersey v. T.L.O.*, the Federal District Court of Minnesota reiterated the following standard:

Under ordinary circumstances, a search of a student by a teacher or other school official will be “justified at its inception” when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.
 2. *Individualized suspicion is generally required.* It is unconstitutional to subject students to full-scale suspicionless searches unless there is clear and specific evidence of special circumstances that would justify such an intrusion.
 3. *Special education students have equal rights.* MRVSEC argued that the expectation of privacy of a student who receives special education is more limited than the expectation of privacy of a student who does not receive special education. MRVSEC further argued that special education students “waive” their right to privacy when they choose to accept special education services from MRVSEC. The court rejected these arguments.

- (a) The court made it clear that special education students do not forfeit all expectations of privacy by virtue of being disabled. “Students with disabilities remain a member of the human family; they generally have the same expectation of privacy in their bodies, and clothing, and personal possessions as any other student.”
 - (b) Although students may be required to submit to random, suspicionless searches as a condition to voluntary participation in extracurricular activities, in this case the court held that participation in a special education program is “very different” from participation in extracurricular activities. The court explained that because school attendance is compulsory, a student’s participation in a special education program is not voluntary like participation in extracurricular activities.
4. *Handbook provisions cannot diminish Fourth Amendment rights.* MRVSEC argued that the students had no expectation of privacy because the student handbook contained MRVSEC’s search policy; the policy stated that student belongings could be searched at any time; and the students signed a form stating that they agreed to abide by the handbook. The court rejected this argument and expressed “grave doubts that an acknowledgement signed by a disabled minor has any legal effect whatsoever.”
 5. *Shakopee Public Schools is not liable for MRVSEC’s searches.* The court granted the Shakopee School District’s motion to dismiss all claims against it because the challenged searches were conducted by MRVSEC employees pursuant to MRVSEC policies. The court also held that Shakopee’s participation on MRVSEC’s board is not a basis for imputing MRVSEC’s policies directly to Shakopee.
 6. *Qualified immunity for individual defendants.* The court held that the individual defendants were entitled to qualified immunity because “it was not objectively unreasonable – although it was incorrect – for defendants to conclude that sufficient special circumstances existed to justify MRVSEC’s search policy under the Fourth Amendment.”
 7. *No unequal treatment based on disability.* The court held that MRVSEC’s search policy violated the Fourth Amendment, but the policy did not deny equal protection or unlawfully discriminate on the basis of disability. The court explained that providing special education students an environment that is safer and freer from distractions than the environment provided to nondisabled students “is plainly a legitimate government interest” that defeats plaintiffs’ equal protection claim. Additionally, the court rejected plaintiff’s disability discrimination claim because there was no evidence that any MRVSEC or Shakopee officials were deliberately indifferent toward plaintiffs’ rights.

III. BURDEN OF PROOF AT HEARING AND SUSPENSIONS DURING PERIOD OF STAY-PUT: *M.M. v. Special School District No. 1*, 512 F.3d 455 (8th Cir. 2008).

A. Facts: The plaintiff is a special education student with a long history of serious behavioral challenges. After the district suspended the student for assault, the parent left an IEP team meeting, which was held to consider the student's behaviors, and she did not request revisions to the IEP. The parent then withdrew the student from the Minneapolis Public Schools and enrolled her at a charter school. Thereafter, the parent re-enrolled the student in the Minneapolis Public Schools. The student's behaviors intensified, and the parties agreed that the student's current placement was no longer appropriate.

The district repeatedly offered to change the placement to a more structured Setting III program, but the parent repeatedly rejected the district's offers. Meanwhile, the student continued to misbehave and was suspended a number of times for various acts of misbehavior. The parent later requested a due process hearing. The ALJ ruled that the school district failed to show it had complied with IDEA. The ALJ concluded that the district violated IDEA by: (a) failing to revise the student's IEP; (b) imposing a series of short term suspensions that totaled more than ten days; (c) failing to provide educational services during the suspensions; and (d) offering a Setting III placement, which the ALJ found to be inappropriate despite finding it was the LRE. The Federal District Court of Minnesota affirmed the ALJ's decision, and the case was then appealed to the Eighth Circuit Court of Appeals.

B. Holdings: The Eighth Circuit Court of Appeals reversed on several grounds.

1. *Burden of proof.* Citing its opinion in *Independent School District No. 11 v. Renollet*, 440 F.3d 1007 (8th Cir. 2006), the Eighth Circuit held that it was error to assign the burden of persuasion to a Minnesota school district in an action to enforce the procedural and substantive requirements of IDEA. To eliminate any doubt over the matter, the Eighth Circuit stated: "Our decision in *Renollet* is controlling until overruled by our court en banc, by the Supreme Court, or by Congress."
 - (b) In *Renollet*, the Eighth Circuit Court of Appeals observed in a footnote that it was error to assign the burden of proof to a school district in a case brought by a parent to enforce the procedural and substantive requirements of the IDEA. *Renollet*, 440 F.3d at 1010 n.3.
 - (c) However, hearing officers declined to follow the decision, apparently believing that it did not directly or adequately address the issue. In *M.M.*, the Federal District Court of Minnesota also declined to follow the *Renollet* decision. The Eighth Circuit has now removed all room for argument on this issue: the burden is on the party requesting the hearing.

2. *No failure to revise IEP.* The Eighth Circuit held that the district could not be held liable for not revising the student’s IEP before the parent withdrew the student and enrolled her in a charter school. The court noted that the parent’s conduct – and specifically her departure from the IEP meeting, her failure to request a change to the IEP, and her failure to request a hearing before withdrawing the student – deprived the school district of the opportunity to revise the student’s IEP.
3. *Authority to suspend during stay-put.* The Eighth Circuit Court of Appeals held:

“When a parent and the school district’s educational professionals agree that a child with a behavioral disability needs a change of placement but cannot agree on an appropriate alternative, the school district must maintain the current, admittedly inappropriate placement under the stay-put IEP until the due process proceedings have concluded, unless the parties agree to an interim alternative placement. . . . If the child continues to misbehave in ways that endanger herself, other students, or school staff, school officials have the authority under *Honig* and [IDEA] to impose suspensions of less than ten days so long as the discipline is consistent with school disciplinary policies and the stay-put IEP. Even a “pattern” of such suspensions is not a *unilateral* change of placement.
4. *Services during suspension.* When a child has been suspended for more than ten days without a change of placement, the law requires that the child continue to receive educational services that “enable the child to continue to participate in the general educational curriculum, although in another setting, and to progress toward meeting the goals set out in the child’s IEP.” The Eighth Circuit held that the ALJ erred in concluding that the district violated this duty because the district had offered homebound services and the parent rejected them.
5. *Deterioration in behavior after appropriate IEP is developed.* The Eighth Circuit distinguished between the failure to address a student’s needs in an IEP and a student’s subsequent lack of progress: “This is not a case like (*Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022, (8th Cir.2003)), where the IEP did not appropriately address the student’s behavior problem. When a child’s primary disability is a behavior disorder, the school district does not violate IDEA simply because the child failed to achieve the IEP’s behavior goals.”
6. *Placement.* Based on the facts of the case, the Court found the proposed placement in a Setting III program was appropriate for the student.

IV. DISTRICT PROVIDED FAPE BECAUSE THE IEP WAS IMPLEMENTED AND WAS APPROPRIATE WHEN IT WAS CREATED: *P.K.W.G. v. Independent School District No. 11*, 2008 WL 2405818, 50 IDELR 158 (D. Minn. June 11, 2008)

- A. Facts:** The student attended a Level IV EBD program. After the parent requested a due process hearing, the parties reached a settlement and agreed to a new IEP for the 2005-2006 school year. The IEP was based, at least in part, on an IEE conducted by Dr. Zeigler and an FBA conducted by Jan Ostrom. The student performed well during the first quarter of the 2005-2006 school year. Unfortunately, his academic performance and behavior later deteriorated. Beginning in February 2006, the school's police liaison officer ("PLO") began to intervene, but staff asked the PLO to remove herself from the vicinity whenever possible because the student appeared to be seeking to provoke the officer and engage her in a power struggle.

As the student's behavior deteriorated, the district made several attempts to informally adjust the services offered under the IEP. Some of the modifications that the district made included the addition of a mentor/advocate, an increase in the involvement of a behavior intervention specialist, a shift to the student's schedule so he would begin the day with one-to-one instruction, and a shift to different classrooms. In June 2006, the district proposed a new IEP for the student. But the parent withdrew the student in September 2006, shortly after he was arrested for disobeying instructions in the lunch room, kicking recycling bins, and resisting arrest.

- B. Claims:** The parent subsequently requested a due process hearing. Among other things, the parent alleged that the district improperly utilized the police liaison officer; that the district did not adequately review and revise the IEP; and that the student's regression and lack of progress demonstrated a denial of FAPE. The ALJ rejected the parent's claims. The parent then appealed to the Federal District Court of Minnesota.
- C. Holding:** The Federal District Court of Minnesota also rejected the parent's claims.
1. *Use of Police Liaison Officer.* The court concurred with the ALJ's conclusion that the school did not overuse the PLO. The school requested the assistance of the PLO for only a few incidents. It was the student who invited the PLO's attention by repeatedly attempting to provoke the officer. The court also noted that the school staff had asked the PLO to try to avoid interacting with the student whenever possible.
 2. *Review and revision of the IEP.* "Although the Student's IEP was not formally revised during the 2005-2006 school year, the District made several attempts to adjust the services within the framework of the existing IEP." Given the success the student had in the first quarter of the year, the court concluded that it was entirely reasonable for the staff to work within the existing IEP rather than making significant changes to it.

3. *Lack of progress does not equate to a denial of FAPE.* An IEP must be reasonably calculated to enable the child to receive educational benefits. In this case, the student's attorney conceded at oral argument that the student's IEP was appropriate and reasonably calculated to benefit the student at the time it was created, and the court found that the district implemented the IEP. The court went on to state: "Although it is unfortunate that the student's grades and behavior regressed after the first quarter of the 2005-2006 school year, the District cannot be liable where both the IEP and the implementation of the IEP complied with IDEA."

V. SECTION 504 DOES NOT REQUIRE SPECIAL TRANSPORTATION WHEN THE IEP TEAM HAS FOUND THAT RELATED SERVICES ARE NOT REQUIRED: *M.Y. v. Special School District No. 1*, 544 F.3d 885 (8th Cir. 2008).

- A. Facts:** The plaintiff was a student who received special education services from the school district for several years. Although the student did not need ESY services, the District provided the student with special education transportation to summer school during the summer of 2003 and 2004. However, in 2005, the IEP team decided that the student would be required to use general education transportation if she attended summer school. The bus driver sexually assaulted the student on the bus in June 2005.
- B. Claims:** The student claimed that the school district denied her FAPE in violation of Section 504 by refusing to provide special transportation in the summer for students who did not need ESY services. Additionally, the student claimed that the school district engaged in disability discrimination by failing to provide transportation as a reasonable accommodation for her disability.
- C. Holding:** The court dismissed plaintiff's claims for the following reasons:
 1. *FAPE under Section 504:* The Court held that the school district's decision not to provide the student special education transportation to and from summer school did not have the effect of denying her FAPE under Section 504, because the IEP team had determined that the student was not eligible for ESY services, including related services such as transportation. (In order to avoid dismissal for failure to exhaust administrative remedies under IDEA, the student had asserted she was not contesting the appropriateness of her IEP.)
 2. *No disability discrimination.* Under Section 504, in order to state a claim in the context of the education of disabled children, a plaintiff must show that the school district acted in bad faith or with gross misjudgment by departing substantially from accepted professional judgment, practice or standards as to demonstrate that the person responsible did not base the decision on such judgment. The court found no evidence that any employee of the Minneapolis School District had acted in bad faith or with gross misjudgment given that the decision not to provide special transportation fully complied with the terms of the IEP.

VI. DUTY TO PROVIDE REASONABLE ACCOMMODATIONS TO DIABETIC CHILD ATTENDING DAY CARE: *A.P. v. Independent School District No. 11*, 538 F. Supp.2d 1125, 49 IDELR 245 (D. Minn. 2008).

- A. Facts:** Parents sought to enroll their five-year-old child in the school district's child care program. The child had Type I diabetes and required a regular external supply of insulin. The parents asked the district to accommodate the child's disability by having three or four staff members trained on how to: (1) check the child's blood sugar, which requires operating a blood-glucose meter; (2) operate his insulin pump so they could suspend the delivery of insulin if his blood sugar became low; and (3) give glucagon injections in the event of a hypoglycemic emergency. The district refused to provide the requested accommodations.
- B. Claims:** The parents filed suit in federal court claiming that the school district engaged in unlawful discrimination on the basis of disability in violation of the ADA, Section 504 of the Rehabilitation Act, and the Minnesota Human Rights Act ("MHRA"). The parents sought compensatory damages from the school district.
- C. Holdings:** In large measure, the court denied the school district's motion to dismiss the parents' claims. The court concluded that most of the claims presented a factual issue for a jury to decide.
1. *A failure to accommodate can constitute disability discrimination.* In a case of first impression in our jurisdiction, the Federal District Court of Minnesota held that "the failure to provide a reasonable accommodation by modifying a disability-neutral policy can indeed constitute disability discrimination in violation of the ADA, the Rehabilitation Act, and the MHRA."
 2. *Not all accommodations are reasonable.* In the context of a day care setting, Section 504, the ADA, and the MHRA require a school district to implement only those accommodations that are *reasonable and necessary*. School districts are *not* obligated to provide accommodations that would fundamentally alter a day care program or place an undue burden on the school district.
 3. *Reasonableness is a question of fact for a jury to decide.* The court held that a jury should decide whether it would be reasonable to train staff to: (1) check a child's blood sugar, which requires operating a blood-glucose meter, (2) operate an insulin pump; and (3) give glucagon injections in the event of a hypoglycemic emergency.
 - (a) However, the court went on to state that the student "is likely to be able to establish at trial that it was reasonable" to ask for the first two accommodations, and the district is "unlikely to be able to establish to a jury's satisfaction that granting either accommodation would have been

an undue burden upon it or would have fundamentally altered the [child care] program.”

- (b) The court’s language in regard to the giving glucagon injections was less harsh to the district. The court noted that giving a glucagon injection is a multi-step process that involves first injecting liquid into a vial of powder to dissolve the powder, then draining the resulting solution back into the syringe, and then injecting the solution into the patient. But the court did note that the parents had presented evidence showing that other day-care programs provided the injections, and plaintiff’s expert witness testified that laypersons could be trained to administer such injections.
4. *Deliberate indifference is the standard for compensatory damages.* The court held that to secure compensatory damages, a plaintiff must show “deliberate indifference.” To show deliberate indifference in this context, a plaintiff must show: (a) that he/she requested the accommodation; (b) that it was “plainly obvious” that the accommodation was reasonable and necessary; and (c) that it was “plainly obvious” when the plaintiff requested the accommodation that granting it would *not* have created an undue burden on the defendant and would *not* have fundamentally altered its program (assuming the defendant has raised the undue burden/fundamental alteration defense).
 5. *No compensatory damages for not giving glucagon injections.* The court held that the plaintiff could not recover compensatory damages based on the district’s refusal to provide glucagon injections. The court explained that such injections involve a “moderately complicated” process; nursing guidelines suggest that the process may not be delegated to personnel who are not supervised by a school nurse; and the district believed it would have to hire a nurse in the child care program to grant the accommodation.
 6. *Possible compensatory damages for not providing other accommodations.* In regard to the school district’s refusal to have staff trained on blood-glucose testing and the operation of the student’s insulin pump, the court held that both of these requested accommodations “were almost certainly reasonable, and almost surely would not have imposed an undue burden” on the district or fundamentally altered the child care program. “Moreover, a reasonable jury could find that it was ‘plainly obvious’ that District 11 should have granted these accommodations to [the child] and that it was ‘plainly obvious’ that doing so would not have been unduly burdensome.”
 7. *Unusual criticism by the court.* In this case, the court seemed to go out of its way to criticize the manner in which the school district handled this case. For example, the court stated that the district’s response to the parents was “slow, clumsy, unresponsive, and, at times, incompetent.” The court further stated that it sympathized with the parents’ “frustration with the bureaucratic indifference that they encountered – bureaucratic indifference that is often encountered by the parents of children with disabilities.”

VII. NO INDIVIDUAL LIABILITY UNDER IDEA OR SECTION 504: *C.N. v. Willmar Public Schools*, 2008 WL 3896205 (D. Minn. Aug. 19, 2008), *on appeal* to 8th Circuit.

- A. Facts:** The parent of a special education student alleged that a special education teacher abused the student and improperly used seclusion and restraint holds. More specifically, the Parent alleged that the teacher improperly: (1) developed a “thinking desk” which required the student to hold a physical posture in excess of thirty minutes or else face restraint; (2) shouted and yelled at the student; (3) pulled the student’s hair; (4) made sarcastic remarks to and belittled the student; and (5) on one occasion denied the student the use of bathroom facilities, which resulted in the student having an accident. The MDE conducted a maltreatment of minor investigation and concluded that the teacher had engaged in maltreatment by denying the student access to the restroom. The school district also conducted an investigation, but the district concluded that the bathroom incident constituted a lapse in judgment and not maltreatment. As a result, the teacher was permitted to return to work. The parent withdrew the student from the district a short time later.
- B. Claims:** The parents requested a due process hearing under IDEA, but the hearing officer dismissed the case because the parents and the student had moved out of the district before requesting the hearing. Undaunted, the parents filed a lawsuit in federal district court seeking to hold the school district liable and also asserting that a number of district employees were *both officially and individually liable* for alleged violations of IDEA, Section 504, Section 1983 (seeking to vindicate alleged violations of the Due Process and Equal Protection Clauses of the United States Constitution), and the Minnesota Human Rights Act.
- C. Holding:** The Court dismissed the case on a number of grounds.
1. *Official capacity claims.* IDEA and Section 504 claims brought against individual defendants in their official capacity are redundant of claims against the district and must be dismissed.
 2. *No individual liability under IDEA.* “As to defendants’ individual capacities, the IDEA does not authorize recovery of damages against teachers or education officials.”
 3. *No individual liability under Section 504.* “Further, Section 504, like the IDEA, does not authorize claims against school officials in their individual capacities.”
 4. *Bad faith or gross misjudgment required to hold a district liable under Section 504.* Applying existing law, the court confirmed that allegations of negligence do not “clear the hurdle set by the explicit language of Section 504.” Rather, in order to prevail against a school district under Section 504, a plaintiff must show that school officials acted in “bad faith” or exercised “gross misjudgment.”

5. *Immunity barred individual liability under Section 1983.* A school official is entitled to qualified immunity from claims under Section 1983, if the official's conduct was reasonable – meaning that it was not a “substantial departure from accepted professional judgment, practice, or standards. Here, the court held that the teacher's use of restraint and seclusion was reasonable because the student's IEP allowed for the use of restraint and seclusion. The court quoted the following language from another federal case: “If we do not allow teachers to rely on a plan specifically approved by the student's parents and which they are statutorily required to follow, we will put teachers in an impossible position – exposed to litigation no matter what they do.”

6. *School district's success under IDEA may bar other claims.* A plaintiff may not establish viable claims under laws other than IDEA if the predicate acts upon which those claims are premised have withstood review under IDEA. Consequently, claims fail as a matter of law when they are intertwined with, or seek to rehash, claims that have been dismissed or resolved through the IDEA administrative hearing process.
 - (a) It would be legally untenable to conclude that school officials acted in bad faith or exercised gross misjudgment when they have been found to have provided an education that complied with IDEA.

 - (b) A finding that a school district has provided a free appropriate public education will bar a substantive due process claim that is based on the same facts.

 - (c) Where a student is “provided with a FAPE in accordance with the requirements of the IDEA, there can be no violation of equal protection merely because the plaintiffs dislike the program provided by defendants.” *Breen By and Through Breen v. St. Charles R-IV School Dist.*, 2 F.Supp.2d 1214, 1222 (E.D. Mo. 1997).

VIII. MOTHER'S OBJECTION TO EVALUATION OVERRIDES FATHER'S CONSENT:
J.H. v. Northfield Public School District, MDE Case No. 08-024-H (May 29, 2008), review by writ of certiorari pending before the Minnesota Court of Appeals.

- A. Facts:** The student's parents were separated, but not divorced. The parents disagreed about whether their ten-year-old child should undergo an initial evaluation to determine eligibility for special education. The student's father gave written consent for the proposed evaluation, but the mother objected to the proposed evaluation. The school district notified the mother that the district would proceed with the initial evaluation and that she had the right to request a due process hearing. The mother then exercised that right. The parties submitted the issue to the administrative law judge (“ALJ”) on a motion without an evidentiary hearing. The district asserted that the consent of one parent triggered an obligation to proceed with the evaluation, subject to the dissenting parent's right to challenge the necessity of the evaluation at a due process hearing. The

mother asserted that she had the right to unilaterally block the evaluation by objecting to the proposed evaluation.

- B. ALJ's Decision.** The ALJ agreed with the mother and provided the following reasoning:

Although “a” parent consented to the evaluation, it is equally true that “a” parent refused consent. The regulations provide schools with remedies when “a” parent declines a student’s evaluation. The use of the singular in the regulations thus provides as much support for the Parent mother’s argument as it does for that of the School District.

* * *

Both parents have rights under IDEA until a family court provides otherwise. *Meanwhile, the School District has the right to request a due process hearing to determine whether an initial evaluation should take place, even without the Parent mother’s consent.* (Emphasis added).

- C. Plain Error in ALJ’s Decision.** In concluding that the district has power to overcome the parent’s objection to an initial evaluation, the ALJ relied on 34 C.F.R. § 300.300(a)(3)(i). This regulation states:

“If the parent of a child enrolled in a public school does not provide consent for initial evaluation . . . the public agency may, but is not required to, pursue the initial evaluation of the child by utilizing the procedural safeguards in subpart E of this part . . . if appropriate, *except to the extent inconsistent with State law relating to such parental consent.*” (Emphasis added).

The ALJ’s decision is contrary to Minnesota law, which differs from the override provision of 34 C.F.R. §300.300(a)(3)(i). Specifically, Minnesota Statutes Section 125A.091, subdivision 5(a), states: “A district may not override the written refusal of a parent to consent to an initial evaluation or reevaluation.” The Minnesota Court of Appeals is expected to issue a decision in this case in the near future.

IX. LRE, INDIVIDUALIZED HEALTH CARE PLANS, AND ONE-TO-ONE PARAPROFESSIONALS FOR SEVERELY DISABLED STUDENTS: *Student v. South Washington County Independent School District No. 833*, OAH-8-1300-19141-9, MDE O8-0001H. (This case was appealed to both the Minnesota Court of Appeals and to the Federal District Court of Minnesota. Both courts dismissed the case for different reasons.)

- A. Facts:** The student is a elementary-age child with severe physical and cognitive impairments. After the child moved into the school district, the IEP team met with the parent and developed an IEP. The IEP placed the student in the general education

classroom for social opportunities, and it placed her in a classroom with three other DCD-SP students for academic and functional instruction. The IEP also provided the student with paraprofessional assistance in a variety of circumstances. Outside the IEP team process, the school nurse developed an Individualized Health Care Plan (“IHCP”) for the student. The IHCP addressed the student’s need for intermittent catheterization during the school day and the need for wound care associated with a decubitus ulcer. The IHCP was written in accordance with orders from the student’s physician. After an occasion on which the nurses were not able to successfully catheterize the student, the parent requested a special education due process hearing.

B. Claims: The parent claimed that the district violated IDEA by: (1) not providing academic instruction, based on grade level outcomes, in the general education classroom; (2) failing to follow the student’s IHCP; and (3) failing to provide one-to-one paraprofessional support. (The parent also made numerous other allegations, which are not discussed here.)

C: Findings & Conclusions. After a full hearing, the Administrative Law Judge (“ALJ”) dismissed the parents’ complaint in its entirety.

1. *Social benefits do not make general education the LRE.* The ALJ found that the student lacked the building blocks to even begin working on grade level outcomes, and that she would not be able to engage the general education curriculum in the general education setting. The ALJ then concluded that “[n]on-academic benefits, such as socialization, do not justify placement in a mainstream setting where there is inability to confer academic benefit to the student in that setting.”
2. *Implementation of IHCP.* The parties vehemently disagreed over whether the IHCP was governed by IDEA and whether it was part of the student’s IEP. In the end, the ALJ concluded: “Although IDEA requires that school districts provide nursing services and other related services that are necessary for a child to receive equal access to educational opportunities, the law does not require that school districts develop an individual healthcare plan for a student with medial needs.”
3. *One-to-one paraprofessional is highly restrictive.* Quoting the Federal District Court of Minnesota, the ALJ concluded that “one-to-one instruction is clearly more restrictive than instruction in a [special education] resource room where other peers are present.” The ALJ went on to state that one-to-one services are not appropriate unless the child needs such services in order to make meaningful educational progress on IEP goals and objectives. Although this child had significant educational needs, the ALJ found she did not need one-to-one paraprofessional support. The district provided also testimony that one-to-one paraprofessional support would inhibit natural interactions and would foster dependence on an adult.

X. BURDEN OF PROOF REGARDING TIMELY SERVICE OF WRIT OF CERTIORARI: *In the Matter of A.M.W. v. Independent School District No. 833, South Washington County*, No. A08-0174 (Minn. Ct. App. 2008).

- A. Facts:** The parent of a child with a disability requested a special education due process hearing to contest the program of education offered to her child. On November 28, 2007, an ALJ issued a decision ruling in favor of the district on all issues. On November 29, 2007, the District received the ALJ's decision by U.S. Mail. The parent did not know the date on which the decision arrived in her mailbox because she was on vacation at the time it was delivered to her mailbox. Sixty-two (62) days after the District received the ALJ's decision, the Parent served a writ of certiorari on counsel for the school district.
- B. Existing Law:** Under Minnesota Statutes Section 125A.091, subdivision 24, a party seeking review of a hearing officer's decision must appeal to the Minnesota Court of Appeals within sixty (60) days after *receiving* the decision. *See In re Chisago Lakes Sch. Dist. and J.D.*, 690 N.W.2d 407, 409 (Minn. App. 2005) (holding that the appeal period "shall expire within 60 days after the party appealing receives the hearing officer's decision"). A writ of certiorari must be discharged for lack of jurisdiction if the relator (i.e. the appealing party) fails to establish that the writ was issued *and* served within the applicable appeal period. *Hickman v. Commissioner of Human Services*, 682 N.W.2d 697, 700 (Minn. App. 2004).
- C. Holding:** The Minnesota Court of Appeals held that the relator (i.e. the appealing party) has the burden of establishing that the petition and writ of certiorari were properly served on the opposing party within 60 days. Here, the parent was unable to carry this burden because she submitted an affidavit stating that she was on vacation and, thus, she did not know when the ALJ's decision was delivered to her mailbox. Consequently, the Court of Appeals discharged the writ of certiorari for lack of jurisdiction.