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LEGAL UPDATE: PRACTICAL IMPLICATIONS OF RECENTLY-ISSUED COURT AND COMPLAINT DECISIONS

2017 MASE Fall Leadership Conference

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I. INTRODUCTION

This presentation will review the decisions of courts and administrative bodies that special education administrators should be aware of and will discuss the practical implications of such decisions. Besides IDEA, this presentation will cover recent opinions related to Section 504 and the Minnesota Government Data Practices Act.

II. Child Find

A. *R.M.M. by T.M. v. Minneapolis Pub. Sch., Spec. Sch. Dist. No. 1*, 15-CV-1627/ 16-CV-3085 (SRN/ HB), 2017 WL 2787606 (D. Minn. June 27, 2017)

Facts. Private school student's parent sought an independent evaluation which concluded the student has dyslexia and a disorder of written expression. Based in part on this report, the district in which the student resided began providing

her with Title I reading services. The student continued to struggle with reading for several years and was referred for an evaluation, and found eligible for special education, in fifth grade. The parents claimed the district failed to fulfill its child-find obligation because it did not identify the student as a child with a disability during her earlier years, and only evaluated her once the private school made a referral.

Holding. The court held that private schools do not have a legal duty to assist public schools in the child-find process; instead, child-find is an "affirmative duty" imposed on public schools. Although the district made many attempts to publicize the availability of educational services for students with disabilities, the court found that it erred by passively waiting for parents to contact the school district or private schools to make referrals.

Implications. Publicizing the availability of special education and related services and relying on private schools for referrals may not be sufficient to meet child-find obligations. Public school districts must make sure they take affirmative steps to locate all children in the district who may have disabilities.

B. *In re Robbinsdale Public Sch. Dist., ISD No. 281*, 17-014C (Minn. SEA Nov. 17, 2016)

Facts. Parent brought complaint that school district (1) failed its child find obligations with respect to student during the 2015-2016 school year, (2) failed to follow proper evaluation procedures after parent requested an evaluation of student, (3) failed to provide student with disciplinary protections, and (4) failed to timely hold a conciliation conference with parent.

Student struggled academically and behaviorally throughout the 2015-2016 school year. She was suspended over twenty days, was dismissed from school and removed from class on several occasions, and was placed in the district's alternative learning center for forty-two days. Student received credit for only three of her ten courses during the first semester, and four of her ten course during the second semester. On November 10, 2015, parent informed district staff that she was concerned about student's ability to focus and was considering medication for student. Student's teachers noted that she was easily distracted and frequently off-task, and they suspected she was suffering from mental health issues. Staff described student as disruptive and adversarial with classmates.

District staff utilized a response to intervention (RTI) plan but did not undertake a special education evaluation until parent requested it do so.

Parent formally requested a special education evaluation on April 14, 2016, and provided her consent for said evaluation on May 9, 2016. The District developed a proposed IEP and sent it to parent on June 6, 2016. Parent was given the opportunity to participate in the IEP process but declined because student was suspended at the time (from June 3 to June 9, the last day of school).

On July 27, 2016, the district received parent's objection to the proposed IEP. The district offered to meet with parent once school resumed in the fall and scheduled an IEP meeting for September 16, 2016. Parent did not attend the meeting. Another IEP meeting was held in November, and parent was in attendance.

Holding. The MDE found for the parent on three issues:

(1) The district failed its child find obligations because the district should have suspected that student had a disability by early February 2016 but did not undertake a special education evaluation until parent requested it do so. By early February, the district knew of student's persistent academic and behavioral struggles based on student's grades, feedback from parent and district staff, and repeated student's discipline referrals. While the district made attempts to address student's struggles through RTI, the district did not consider waiving pre-referral interventions because of student's urgent need for an evaluation.

(2) The district followed proper evaluation procedures by completing an evaluation and report within thirty school days of receiving parent's consent. Additionally, the district developed an IEP within thirty days of determining student was eligible for special education services. Parent was given the opportunity to participate in the IEP process.

(3) The district's failure to extend disciplinary protections of IDEA prior to her end of school year suspension was a violation of 34 C.F.R. § 300.534 because the district had reason to believe the student had a disability at least as early as the date the parent requested an evaluation.

(4) The district's failure to conduct a conciliation conference with parent within ten days of receiving her July 27, 2016 objection violated Minn. Stat. § 125A.091.

The MDE required the district and parent to develop a compensatory education plan for student. Additionally, the district was required to review its procedures for initiating special education evaluations, specifically related to the multi-tiered support system (MTSS), to prevent unnecessary delays; create a specific training plan for the MTSS process; and draft written instructions for handling special education requests over the summer.

Implications. RTI is not a substitute for an evaluation, and may be waived if a student has an urgent need for an evaluation.

Disciplinary protections apply to students who a district has reason to believe may have a disability, even if the parent has not yet consented to an initial IEP.

III. ESY

A. *In re Complaint Brought on Behalf of Student and All Students in the Functional Skills Program at Halverson Elementary School, Ind. Sch. Dist. No. 241,* A17-0085 (Minn. App. Oct. 2, 2017)

Facts. Complainant alleged that District improperly determined eligibility for ESY, unilaterally limited services, and failed to include parents in ESY decisions. School district trained special education staff in ESY requirements, however, training materials incorrectly stated Minnesota Rule 3525.0755. Rather than regression, self-sufficiency, *or* unique needs, the training materials stated the requirements were regression AND/OR self-sufficiency AND unique needs.

During the MDE Complaint investigation, the Investigator scheduled interviews with seven District employees. However, the Investigator refused to continue interviews after learning that the school district intended to record them. MDE agreed to conduct the remaining interviews "on paper," but did not do so.

MDE found four violations: (1) the district failed to determine if all students were in need of ESY services" in a manner consistent with Minn. R. 3525.0755; (2) the district failed to ensure that each student's IEP team decided whether ESY services were necessary; (3) the district failed to provide notice to parents of two students that there had been a change in the provision of ESY services; and (4) the district unilaterally limited the types of services available to students receiving ESY services in the summer of 2016.

The district appealed two of MDE's conclusions: that it failed to make determinations consistent with the rule, and that it failed to have IEP teams

determine eligibility. The district also alleged that MDE's failure to complete interviews resulted in a flawed investigation process.

Holding. The Court held that the district's training demonstrated that the district failed to properly consider students for ESY eligibility. The Court noted that MDE's decision not to interview additional staff members was not justified based on the record—indeed, in order to determine what happened at IEP meetings regarding ESY, the Department needed to interview staff who were there—but the decision not to interview staff did not change the final outcome.

Implications. MDE may presume that a violation of IDEA occurred if a district has improper training materials.

ESY should be discussed at IEP meetings and any changes should be documented in a PWN.

B. ***In re Seven Hills Preparatory Academy, Indep. Sch. Dist. No. 4159,*** **17-079C (Minn. SEA May 25, 2017)**

Facts. Parent brought complaint on behalf of student after student was denied ESY services by the school. In December 2015, the student's IEP team determined that student should receive ESY services and incorporated ESY services for the 2016 summer into student's IEP. In May, student's IEP manager informed parent that student did not qualify for ESY services because student had grown in his skills and had not shown regression after winter break. The IEP team did not meet to discuss or revise the December IEP. The school did not offer ESY services to student, and parent arranged private services during the 2016 summer.

Holding. The MDE determined that, because ESY services were included in student's IEP, the school violated both federal and state law by failing to provide student with ESY services. The school was required to reimburse parent for out-of-pocket expenses arising from the private services used during the 2016 summer.

Implications. MDE may order reimbursement of costs of private services already received as compensatory education for failure to comply with ESY determined necessary by an IEP.

IV. Transportation

A. *In re Anoka-Hennepin Pub. Sch. Dist. No. 11*, 17-055C (Minn. SEA March 23, 2017)

Facts. Open-enrolled student began the school year with an IEP that did not include transportation. Consistent with the district's general practice, the student's parent dropped him off at a location within the district's boundaries and the student rode a general education bus from that location. During the year, the student's IEP was amended and included special transportation to reduce the student's stimulus on the bus. The parent also requested to have the student dropped off at a different daycare at the end of the day. The daycare was located within the attendance area for a different school within the district. The district offered to serve the student at the other school.

Holding. The MDE held that the district violated the student's rights by failing to consider, on an individual basis, whether the district's transportation policy needed to be modified to meet the student's needs.

Implications. Transportation needs for students with disabilities need to be considered on a case-by-case basis and may include a requirement to transport a student outside district boundaries or within a different attendance zone if necessary to provide FAPE.

B. *Osseo Public School District, Indep. Sch. Dist. No. 279*, OAH 82-1300-34084 (Minn. OAH March 17, 2017)

Facts. Parent of an open-enrolled student requested reimbursement for transporting student to and from school. The district offered mileage for transportation from the district's boundary to the school, but not from the student's home to the school. The district argued that it was not required to pay for transportation outside the district's boundaries, consistent with prior Eighth Circuit decisions holding that a district may apply a "facially neutral" transportation policy to a child with a disability.

Holding. MDE held that the district was required to reimburse the parent's past transportation expenses and provide transportation from the student's residence to the school, even though such transportation was outside the district boundaries.

Implications. If an open-enrolled student has special transportation as a related service, the enrolling district is responsible for transporting the student to and from the student's residence.

V. Medical Needs

A. *In re West St. Paul-Mendota Heights- Eagan, Indep. Sch. Dist No. 0197,* 17-071C (Minn. SEA April 25, 2017)

Facts. Student had a gluten allergy that required a special diet. Her IEP listed necessary accommodations, including district communication with food and nutrition staff regarding the student's needs. At one point, the ingredient list on food served to the student changed; although it previously did not contain ingredients that triggered her allergy, the new recipe did. That change was not noted by food service staff and not communicated to the student or parents.

Holding. MDE held that the district failed to implement the student's IEP when it failed to communicate with staff regarding the student's allergy.

Implications. Districts should have clear plans for who needs to communicate portions of an IEP to other staff.

B. *In re Ashby School District,* 05-16-1321 (OCR Oct. 31, 2016)

Facts. Complainant filed a complaint alleging the school district violated Section 504 and Title II when the district (1) failed to evaluate the student for special education services; (2) failed to make student's epilepsy medication available on the school bus, during field trips, and during after school programs; and (3) failed to ensure district staff would administer the epilepsy medication in case of seizure on school grounds or at a school activity.

In response to the complaint, the district (1) conducted an evaluation of student; (2) jointly developed a seizure action plan for the student, including the location of student's epilepsy medication and district staff responsible for administering the medication; and (3) trained several staff members, including student's teachers and an after school care provider, about student's condition and the administration of medication to student.

Holding. OCR dismissed the complaint after it concluded the allegations had been resolved.

Implications. Students with medical needs may need to be evaluated for special education or related services in order to accommodate their needs.

VI. IEE's

A. *In re St. Paul Pub. Schs., Indep. Sch. Dist. No. 625,* OAH 5-1300-34351, MDE 17-015H (Minn. SEA May 18, 2017)

Facts. A different school district conducted an evaluation of a student for special education. The parents subsequently open enrolled the student in a new school district. The new district discussed proposing a reevaluation, but did not formally do so because the student was doing well and the parents agreed a reevaluation was not necessary. The parents then requested an IEE at public expense because they disagreed with the former school district's most recent evaluation. The new district objected because it had not yet had the opportunity to conduct an evaluation. The new district brought a request for due process hearing arguing that because it had not yet conducted an evaluation, it could not be required to pay for an evaluation.

Holding. In a case of first impression, an Administrative Law Judge found that a district is responsible for paying for an IEE at public expense, even if the evaluation to which the parents object was conducted by a prior district.

Implications. If a student transfers into a school district with a prior district's evaluation, the new district may be responsible for paying for an IEE if the parent objects to the prior evaluation.

VII. Parent Participation

A. Letter to Anonymous, Family Policy Compliance Office (July 13, 2017)

Facts. FERPA has an amendment process in which a parent can request revisions to education records on the basis that they are "inaccurate, misleading, or otherwise in violation of the student's right of privacy." A parent wrote to the Family Policy Compliance Office ("FPCO"), the federal agency that oversees administration of FERPA, alleging that a school district violated the parent's rights by refusing to correct an IEP. The parent alleged the IEP reflected incorrect service minutes, but the district refused to make the change.

Holding. The FPCO stated that the right to amend records is not unlimited and is not intended to change substantive decisions such as grades or other

evaluations of the student. Instead, "FERPA was intended to require only that educational agencies and institutions conform to fair recordkeeping practices and not to override the accepted standards and procedures for making academic assessments, disciplinary rulings, or placement determinations." The FPCO noted that a revision to the IEP must follow IDEA's procedures rather than FERPA.

Implications. The FERPA amendment process will, generally, not be applicable to special education records.

B. *Forest Lake Indep. Sch. Dist. No. 831*, 17-076C (Minn. SEA May 12, 2017)

Facts. Parent filed a complaint alleging that the school district failed to provide her with an opportunity to participate in student's IEP meeting by scheduling the meeting for a time when parent was not available. The district was required to review and revise student's IEP by March 29, 2017. In December 2016, parent emailed the special education director requesting a facilitated team meeting on March 16, 2017. On January 24, 2017, the director informed parent that a majority of the student's IEP team was not available on March 16 and requested parent provide additional dates. During February and March 2017, parent went back and forth with the director, insisting the meeting be held on March 16 and refusing to provide any other dates before March 29. After parent failed to provide any available dates, aside from March 16, the director scheduled an IEP team meeting for March 28. Parent was unavailable on March 28 and did not attend the meeting.

Holding. The MDE found that the district complied with federal law when it conducted the March 28 IEP meeting in parent's absence because the district made numerous attempts to schedule the meeting in coordination with parent, but parent failed to provide her availability.

Implication. It is important to document repeated attempts to schedule with a parent. With sufficient documentation of multiple attempts, an IEP team may be convened without the parent.

VIII. Service Animals

A. *Fry v. Napoleon Community Schools*, __ U.S. __, 137 S. Ct. 743 (2017)

Facts. Parent brought action on behalf of minor daughter against school district after district refused to allow student to bring her service dog to school. Student

suffered from severe cerebral palsy and had an IEP in place which provided for a human aide. Parents initially filed a complaint with OCR alleging the district's refusal violated Section 504 and Title II, and OCR agreed with parents. The district then invited student to bring her service dog, but parents ultimately enrolled student in another district.

The district's motion to dismiss the complaint was granted by the district court and affirmed by the Sixth Circuit on the basis that parent's action was barred because parent had not exhausted IDEA's administrative remedies.

Holding. The Supreme Court determined that whether a plaintiff's claim is subject to IDEA's exhaustion requirement depends upon whether the gravamen of plaintiff's claim is the denial of FAPE. Because the parent's claim was that the district had violated Section 504 and Title II by denying student equal access to public facilities (the school) and not that the district had denied student a FAPE, parent was not required to exhaust administrative remedies under IDEA.

Implication. Students seeking disability discrimination claims are not required to pursue IDEA remedies first.

B. *Alboniga, Individually and on Behalf of A.M., a Minor v. School Board of Broward County Florida,* 87 F. Supp. 3d 1319 (S.D. Fla. 2015)

Facts. Parent, on behalf of student, requested that student be allowed to bring his service dog to school. Student suffers from multiple disabilities, including cerebral palsy, spastic quadreparesis, and a seizure disorder. In 2012, the school board developed policies related to service animals in its schools. These policies required vaccinations above and beyond those required under Florida law and required parent to provide additional liability insurance for the dog. The district informed parent that she would need to comply with both policies before student's service dog would be allowed to accompany student. Additionally, the district informed parent that she needed to provide a handler for the dog, and the handler could not be the student. Parent sued, arguing that the district should accommodate the student by allowing him to bring his service dog to school without a separate handler, additional liability insurance, and additional vaccinations. Parent also requested that a district employee accompany the student and the dog outside when the dog occasionally needs to urinate. While at school, the dog was tethered to the student's wheelchair. The dog did not eat or drink at school and was trained to indicate to the student if he needed to urinate.

During the course of litigation, the student was allowed to bring his service dog to school. At times, parent served as a handler for the dog; at other times, the district assigned a janitor to serve as a handler.

Holding. (1) Board policy requiring liability insurance and additional vaccinations is impermissible under Title II because it essentially results in a surcharge to student for bringing his service dog to school.

(2) Tethering the service dog to A.M.'s wheelchair without a separate handler for the dog is a reasonable accommodation. Given the dog's training and the tethering of the dog to A.M.'s wheelchair, A.M. could act as the dog's handler.

(3) Requiring school staff to assist A.M. in taking the service dog outside to urinate is a reasonable accommodation. The accommodation required staff to assist A.M., not to care for or supervise the dog.

Implications. When accommodating the needs of students with disabilities, a reasonable accommodation for the student may involve assistance with a service animal.

IX. FAPE

A. *Endrew F. ex rel. Joseph F v. Douglas County Sch. Dist. RE-1*, __ U.S. __, 137 S. Ct. 968 (2017)

Facts. Student with autism was provided special education services by the school district according to his IEP. Prior to fifth grade, district staff revised the IEP. Parents disagreed with the revisions, as they were minimal and the proposed IEP resembled prior IEPs, because parents felt that student was not progressing enough. Parents removed student from the district and enrolled him in a private school for the fifth grade. They then sought reimbursement for tuition, alleging the district had denied student a FAPE.

Holding. A school district must develop an IEP that is "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." The Supreme Court declined to endorse the district's interpretation that it need only provide some benefit to satisfy FAPE. It also declined to impose a higher standard advanced by parents. Thus, the Court essentially reaffirmed its decision in *Board of Ed. of Hendrick Hudson Central Sch. Dist., Westchester Cty. v. Rowley*, 458 U.S. 176 (1982). Finally, the Court declined to elaborate on the meaning of "appropriate progress," reiterating that

the sufficiency of an IEP is dependent upon the student whom the IEP is intended to service.

Implications. The Court essentially reaffirmed the existing standards for FAPE. The decision addressed a conflict in interpretations that existed in some federal circuits, but with respect to the Eighth Circuit (which governs Minnesota), the standards remain the same.

B. *I.Z.M. v. Rosemount-Apple Valley-Eagan Public Schools, Indep. Sch. Dist. No. 196,* No. 16-1918 (8th Cir. 2017)

Facts. Student with visual impairment argued that school district failed to provide him accessible instructional material in Braille and failed to provide functioning assistive technology. The student was capable of reading Braille, but frequently chose not to do so.

Holding: The Eighth Circuit Court of Appeals held that Minnesota's Blind Persons' Literacy Rights and Education Act does not impose a heightened standard requiring school districts to guarantee that a blind student can read Braille. IDEA and the Act only require a district to provide instruction "sufficient to enable" a blind student to be able to attain a level of proficiency. The fact that the student chose not to read in Braille contributed to his lack of progress, but did not mean he did not receive an educational benefit.

The Court also held that IDEA does not require the legal standard of "strict compliance" in order for a district to satisfy its obligation to offer FAPE. IDEA does not *guarantee* progress.

Implications. An IEP does not guarantee a certain level of progress, nor does Minnesota law require achievement of specific milestones (i.e. reading Braille) for all students. Instead, the obligation is to provide goals that are reasonably calculated to provide educational benefit. Case law also suggests that a student's effort may be considered in determining sufficiency of progress.

C. *Spec. Sch. Dist. No. 1, Minneapolis Pub. Schools v. R.M.M, by and through O.M.,* 861 F.3d 769 (8th Cir. 2017)

Facts. Student and her Parents resided in the Minneapolis Public School District. The student attended a private Catholic school, also located within the district. The student struggled at her private school and received "extra support and instruction" at that school. In fifth grade, she was referred to the district for

a special education evaluation and determined eligible for services in reading and writing. The district proposed an Individual Service Plan ("ISP") with one hour of direct instruction twice per week at a district school and transportation from the private school to the district school for services. The student attended four sessions, but the parents rejected further services. The student filed for a due process hearing.

Holding. The Eighth Circuit held that private school students are entitled to receive FAPE and a due process hearing pursuant to Minnesota law. It found that the plain language of Minnesota Statutes provides private school students a right to FAPE. *See* Minn. Stat. § 125A.18. Although the federal law has limited the rights of private school students since 1997, states can have standards for FAPE that exceed federal law, and Minnesota does. The court further held that because IDEA permits a due process hearing to challenge a denial of FAPE, the student was entitled to a due process hearing on her FAPE claims. Such a holding contradicted the traditional practice in Minnesota in which private school students were not permitted to request due process hearings because they cannot do so to challenge shared-time services.

Implications. Private school students in Minnesota are entitled to FAPE and may bring a due process hearing to challenge their receipt of it.

X. Miscellaneous Special Education

A. *In re Anoka-Hennepin Pub. Sch. Dist.*, Indep. Sch. Dist. No. 11, 17-044C (Minn. SEA June 6, 2017)

Facts. Complaint alleged that district required students who would turn five years old by September 1, 2016 to enroll in kindergarten in order to continue receiving special education and related services, rather than continuing to provide those students early childhood services. The district explained that it served kindergarten-eligible students in the age-appropriate setting, which was kindergarten, rather than an early childhood classroom. The district considered general education kindergarten to be the least restrictive environment for most students.

Holding. MDE found that the district could not require five-year-old students to enroll in kindergarten in order to receive continued special education and related services. The district's obligation to provide FAPE continued, even after parents refused to enroll their children in kindergarten. MDE noted that Minnesota law

does not require compulsory attendance until a child reaches age seven, and that students eligible for early childhood special education could continue to receive special education in the early childhood setting until the child is seven.

Implications. A district may not require kindergarten-age students to attend kindergarten as a condition for receiving special education and related services.

B. *In re Farmington Pub. Sch. Dist., ISD No. 192*, 17-096C (July 5, 2017)

Facts. The school district had two scheduled "flexible learning days" during the school year in which students and staff were not in school. Students were expected to complete work online using the district's digital learning platform and staff held online "office hours" from 10-11:30 a.m. The student's IEP included access to a resource room as a supplementary aid and service. The student could contact his resource room teacher via phone or e-mail on flexible learning days, but did not have access to in-person support in the resource room.

Holding. MDE found a violation of the student's IEP because he did not have access to the resource room on flexible learning days. After the two flexible learning days, but before the MDE Complaint, the student's IEP had been revised to reflect additional accommodations for flexible learning days, including additional time to complete those assignments. MDE concluded that such revisions were sufficient and no further corrective action was needed.

Implications. Districts must make efforts to consider how accommodations for special education students will be implemented on alternative learning days.

XI. Other Cases of Interest

A. Minnesota Government Data Practices Act ("MGDPA")

1. *Burks v. Metropolitan Council*, 884 N.W.2d 338 (Minn. 2016)

Facts. Burks requested a video recording from a Metro Transit bus on which he was a passenger. The video depicted an incident between Burks and the driver after Burks had difficulty boarding the bus. Burks requested the video seventeen days after the incident occurred. Metro Transit refused to grant Burks access to the video on the basis that the video was maintained as private personnel data on the bus driver. Burks sued Metro Transit.

Holding.

- The Supreme Court held "the [MGDPA] confers a right of access to stored private or public data on an individual if he or she is or can be identified as the subject of the data." *Burks*, 884 N.W.2d at 342. This holds true regardless of whether the data is classified as private data on another individual. What matters is whether an individual is identifiable as a subject of the data.

- The Supreme Court did not decide whether the video was private or public data, finding the conclusion ultimately irrelevant because the data subject is entitled to both private and public data.

- The Supreme Court refused to find that the driver's rights to the protection of his private personnel data outweighed Burks' rights to access private and public data about him.

Implications. Data maintained as private data on a school employee may be subject to disclosure under the MGDPA if another individual can be identified as a subject of the data. This has practical application if, for example, a parent requests data referring to both the parent's child (a subject of the data) and an employee.

2. *KSTP-TV v. Metropolitan Council*, 884 N.W.2d 342 (Minn. 2016)

Facts. KSTP requested two video recordings from Metro Transit buses which depicted potential misconduct by the bus drivers (an accident and an altercation with a bicyclist). Metro Transit denied KSTP access to the recordings on the basis that the recordings were private personnel data. The recordings were initially maintained on hard drives located on each individual bus and would continue to be maintained on local hard drives for approximately 330 hours of recording. To maintain the recordings beyond the 330 hours, a Metro Transit employee had to download the video onto a DVD. The videos at issue were subsequently downloaded to DVDs as part of employee reviews conducted by Metro Transit. KSTP filed an administrative complaint.

Holding.

- The Supreme Court adopted the single-purpose reading of the MGDPA. Essentially, this means that, if any of the purposes

for which data are maintained renders that data public (while other purposes may render it private), the data are public.

- The Supreme Court held that the classification of the data at the time a data practices request is made, not at the time the data are created, determines the classification of the data (i.e. public or private). Thus, the Supreme Court determined that data maintained solely as private personnel data at the time of the request, even though that data had been maintained for other purposes at the time of its creation, could not be disclosed as public data. For purposes of KSTP's request, if the recording was maintained on the local hard drives at the time of the request, then KSTP may have been entitled to access the data.

Implications. How a government entity classifies data at the time of a data request is what matters under the MGDPA. While the entity may have created it for several different purposes—some of which would result in classification of public data—if the entity maintains it for one single purpose that results in classifying the data as private, the entity need not disclose the data.

B. Transgender Students and Employees

1. *Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017)

Facts. This case involves a 17-year old transgender student named Ash. His birth certificate designates him as female, but he identifies as male and is going through a female-to-male transition. During his sophomore year, the school district prohibited him from using male restrooms in the school because the District believed his presence would invade the privacy rights of his male classmates. He tried to hold his urine rather than use the restroom at school.

During his junior year, Ash used the male restrooms for six months but was eventually reported by a teacher. An administrator told Ash that he could not use the male restroom because he was listed as a female in the school's official records and to change those records, the school needed unspecified "legal or medical documentation." Ash's doctors wrote letters to the District, but the District maintained that he needed a surgical transition, an expensive and risky procedure that is prohibited for minors. Ash continued to use the male restroom despite the District's policy, but he was still anxious, depressed, suicidal, and was monitored and removed from class on several occasions to discuss his violations of the policy.

Thus, Ash again began to avoid using restrooms to avoid being disciplined.

In June 2016, Ash filed an action in federal court against school district, alleging that the high school's unwritten policy, which barred him from using the male restrooms, violated Title IX and the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution. The U.S. District Court denied the District' motion to dismiss and granted in part Ash's motion for a preliminary injunction. The District was ordered to allow Ash to use male restrooms and not to monitor or discipline him for doing so. The District appealed.

On appeal, the Court of Appeals affirmed the grant of the preliminary injunction.

Issue. Whether the Title IX and constitutional equal protection rights of a transgender K-12 student, who is in the process of transitioning from female to male and identifies as male, were violated when the school district prohibited him from using the boys' restrooms in the student's school?

Decision. Yes. In granting Ash's motion for a preliminary injunction, the Court of Appeals held that it is likely the student will succeed on his claims that the District violated his Title IX and equal protection rights by prohibiting his use of the boys' restrooms at his school. The basic holding applicable to other cases includes:

- **Transgender students may bring sex-discrimination claims under Title IX based upon a theory of sex-stereotyping**—a new rule for this circuit that other circuits and district courts have already adopted (e.g., Sixth Circuit). The court made this conclusion by looking at the U.S. Supreme Court's expansive view of Title VII concerning sex discrimination and harassment in employment, and courts have recognized a cause of action under Title VII when an adverse action is taken because of an employee's failure to conform to sex stereotypes. Thus, employers and educational institutions cannot discriminate based on a person's gender or failure to conform to stereotypical gender norms.

- **The student was likely to succeed on Title IX sex discrimination claim based upon a theory of sex-stereotyping.** Title IX prohibits sex discrimination in education. Although institutions may provide separate but

comparable restroom facilities, they cannot deny access to restrooms because someone is transgender.

Practical Implications. This case is part of a nationwide trend among the courts permitting Title IX and constitutional claims by transgender students based on sex-stereotyping and other theories, and, in many cases, such as here, the courts have ruled in favor of the transgender student on preliminary injunction and other motions.

2. Department of Justice Guidance on Transgender Employees

Contrary to most court decisions, which have held that Title VII and Title IX protect transgender students and employees from discrimination, Attorney General Jeff Sessions recently released a memorandum indicating the Department of Justice's position that transgender employees are not protected from discrimination on the basis that they are transgender.

The Department characterized this guidance as "a conclusion of law, not policy." The U.S. Supreme Court has not ruled on whether Title VII protects transgender employees from discrimination, but the majority of courts which have considered similar questions have concluded that it does. This guidance applies to interpretations by federal agencies, but is not binding on courts.

The Minnesota Human Rights Act ("MHRA") specifically prohibits discrimination on the basis of gender identity in Minnesota. The most recent Minnesota Supreme Court interpretation of how the MHRA's protection for gender identity applies to facilities like restrooms is found in *Goins v. West Group*, 635 N.W.2d 717 (Minn. 2001). In *Goins*, the court ruled that the MHRA does not require that an entity either allow or prevent transgender individuals from using the facilities that correlate with their gender identity.

RASW: 96085