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FROM THE SCHOOLHOUSE TO THE COURTHOUSE:

Special Education Cases, Guidance and Other Developments

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ADMINISTRATIVE GUIDANCE FROM OSEP – GUIDANCE RESCINDED

On October 20, 2017, the United States Department of Education Office of Special Education and Rehabilitative Services ("OSERS") announced that it had rescinded 72 guidance documents, 63 from the Office of Special Education Programs ("OSEP") and 9 from the Rehabilitative Services Administration. Some of the guidance documents have been in effect for more many years. OSERS has determined that these documents are either "outdated, unnecessary, or ineffective." A list of the rescinded guidance documents accompanies this handout.

FAPE - EDUCATIONAL BENEFIT – THE AFTERMATH OF ENDREW F.

A. Endrew F. v. Douglas Co. Sch. Dist. RE-1, 137 S. Ct. 988 (2017). The Tenth Circuit's "merely more than de minimis" standard sets the bar too low when assessing whether a student with a disability has been provided with FAPE. From a substantive perspective, schools are to offer an IEP that is reasonably calculated to enable a child to make progress in light of the child's circumstances. Thus, the Tenth Circuit's finding that the

district provided FAPE is vacated and remanded for further proceedings. [NOTE: On August 2, 2017, the Tenth Circuit vacated its decision and remanded the matter to the district court for further proceedings consistent with the Supreme Court's decision].

B. I.Z.M. v. Rosemount-Apple Valley-Eagan Pub. Sch., 863 F.3d 966 (8th Cir. 2017)
A school district did not deny a visually impaired ninth-grade student a FAPE by failing to provide certain assignments in Braille. The Eighth Circuit held that the district made reasonable efforts to provide the student with Braille instructional materials in a timely manner. The court rejected the parents' argument that the IDEA regulation, at 34 C.F.R. § 300.172, which governs access to instructional materials, created a "strict compliance" standard that would make the district liable for even a single implementation failure. The court held that the regulation requires districts to "take all reasonable steps" to provide accessible instructional materials to students with visual impairments and print disabilities in a timely manner. The court stated: "[T]he plain language of the regulation ... is consistent with our prior cases, applying the [U.S.] Supreme Court's decision in [*Hendrick Hudson Central School District v. Rowley,* 553 IDELR 656 (1982)] and holding that 'a school need not maximize a student's potential or provide the best possible education at public expense…'" The panel further noted that its interpretation aligned with the Supreme Court's more recent ruling in *Endrew F. v. Douglas County School District RE-1,* 69 IDELR 174 (2017), that an IEP must be reasonably calculated to enable a student to make progress that is appropriate in light of his circumstances. The 8th Circuit acknowledged that the district did not provide all instruction and assignments in Braille as the student's IEP required. However, it pointed out that most of the implementation failures related to short assignments the student could read with alternative aids and large print. Given that the student earned good grades in his general education and honors courses despite the implementation failures, the 8th Circuit held that the occasional lapses did not result in a denial of FAPE. The 8th Circuit also ruled that Minnesota's Blind Persons' Literacy Rights and Education Act did not create a higher standard of FAPE with regard to instruction in Braille and the use of Braille. The court explained that the statute did not require districts to guarantee that students with visual impairments will reach a specific level of proficiency in Braille, but only to provide instruction that was sufficient to enable the student to reach that level.

C. C.G. v. Waller Indep. Sch. Dist., 70 IDELR 61 (5th Cir. 2017) (unpublished). This Circuit's standard for FAPE is not inconsistent with the *Endrew F*. standard. Under the Fifth Circuit's 4-factor standard, an IEP is appropriate if 1) it is individualized on the basis of a student's assessment and performance; 2) it is administered in the LRE; 3) it is implemented in a coordinated and collaborative manner by the key stakeholders; and 4) it demonstrates positive academic and nonacademic benefits. The parents' argument that the child's IEP did not satisfy the *Endrew F*. standard which requires an IEP to be "appropriately ambitious" in light of the child's unique circumstances is rejected, since the two standards are not inconsistent. While the district court in finding the district's IEP appropriate did not articulate the *Endrew F.* standard verbatim, the court's analysis of the IEP is fully consistent with that standard and leaves no doubt that the district court was convinced that the IEP was appropriately ambitious in light of the child's circumstances.

D. Sean C. v. Oxford Area Sch. Dist., 70 IDELR 146 (E.D. Pa. 2017). Courts and hearing officers are required to address the substantive appropriateness of an IEP based on information available at the time of its development. Here, the SLD student's IEPs for 9th, 10th and 11th grades addressed his known academic and behavioral issues and where designed to confer educational benefit that was appropriate in light of the student's circumstances. The parent's position that the district denied FAPE by waiting until the 11th grade to address the high schooler's anxiety, the hearing officer found that the district had no reason to address the issue, as the student did not exhibit behaviors that caused educators to view him as having anxiety. Importantly, the IEP team revised the student's IEP on several occasions after the parent informed the district of the student's mental health needs to address emotional and behavioral issues. Further, the student made progress toward many of his annual goals and advanced from grade to grade, despite his lack of attendance, inattentiveness and "erratic" academic performance. Thus, compensatory education was not warranted and the hearing officer's decision in favor of the district was upheld.

E. C.D. v. Natick Pub. Sch. Dist., 69 IDELR 213 (D. Mass. 2017). The hearing officer's application of the "some educational benefit" standard in a 2015 decision finding in favor of the district's proposed program complicates this court's review of it in light of the *Endrew F.* decision by the Supreme Court. According to the hearing officer, the proposed IEP was designed to meet the student's unique needs and was reasonably calculated to enable her to receive an educational benefit. However, the Supreme Court later held that an IEP must allow a child to make progress that is appropriate in light of her unique circumstances. Because the court needs to know whether the standard used by the hearing officer aligns with the *Endrew F.* standard, the case is remanded to the hearing officer to indicate whether she would have reached the same or a different result under the *Endrew F.* standard and decide whether further proceedings at the due process hearing level are appropriate.

EXHAUSTION OF ADMINISTRATIVE REMEDIES

A. Fry v. Napoleon Community Schs., 137 S. Ct. 743 (2017). The IDEA's requirement to exhaust administrative remedies prior to bringing money damages claims in federal court under Section 504 or the ADA applies when the gravamen of the complaint is one for a denial of FAPE. The Sixth Circuit's analysis of the parents' claims was overly broad in requiring the parents to exhaust the IDEA's administrative remedies prior to suing for damages against a district that refused to allow a 5 year-old girl with CP to bring her service dog to school. The exhaustion requirement applies only to claims involving the provision of FAPE, not just those with a connection to a student's education. In determining whether a complaint seeks relief for a denial of FAPE, lower courts should look to the substance of the pleadings rather than to specific language or labels used. Two hypothetical questions should be considered: first, could the student assert the same claim against a public entity that was not a school, such as a public library? Secondly, could an adult at the school assert the same claim against the district? If the answer to both questions is yes, it is unlikely that the claim involves a denial of

FAPE and, therefore, it does not have to be exhausted. Since neither party addressed the issue in this fashion, the case is remanded to the Sixth Circuit to consider whether the parents were seeking relief for a denial of FAPE or whether they had attempted to do so in the past.

B. J.M. v. Francis Howell Sch. Dist., 69 IDELR 146, 850 F.3d 944 (8th Cir. 2017). Applying the Supreme Court's decision in *Fry*, the question here is not whether the parent referenced the IDEA or related terminology in her complaint brought under Section 1983, 504 and ADA, but whether the substance of her complaint related to the student's education. The complaint alleged a loss of educational benefits resulting from the district's purported use of seclusion and restraint and also stated that the district failed to provide the support services the student needed to benefit from instruction. Thus, the complaint was based on an alleged denial of FAPE under the IDEA and, although the parent framed the complaint as one alleging disability discrimination, it falls squarely within the scope of IDEA's requirement that she first exhaust administrative remedies. In addition, the parent's argument that her request for money damages made exhaustion unnecessary is rejected, as most Circuit Courts require exhaustion even when parents seek only money damages. The parent's choice of remedy does not allow her to circumvent the exhaustion requirement.

ATTORNEY'S FEES –STATUTE OF LIMITATIONS

Brittany O v. Bentonville Sch. Dist. 69 IDELR 264 (8th Cir. 2017)(unpublished). How long after winning a due process hearing does a prevailing parent have to petition the court for attorney's fees? Here, the parents prevailed at due process on Nov. 25, 2013. On March 5, 2014, they filed in court to collect attorney's fees from the district, about two weeks *after* the 90-day time period expired for the school district to appeal the hearing decision to court. The school district argued that an Arkansas time limit applied to attorney's fees petitions and that the parent's fee petition was untimely. The Eighth Circuit disagreed, holding that the parents properly followed state law in letting 90 days pass after the district lost at due process before making their request. The time limit for petitioning for fees did not begin to run until the 90-day period had expired for an aggrieved party to challenge the IDEA administrative decision becomes final, and the parties know who is the prevailing party. The school district had until February 23, 2014 to appeal the due process hearing decision. The parents filed for attorney's fees on March 5. Therefore, even if the limitations period was 90 days after the district's window to challenge the due process decision closed, the parents were on time.

BEHAVIOR AND DISCIPLINE

A. J.M. v. Liberty Union High Sch. Dist., 70 IDELR 4 (N.D. Cal. 2017). District's expulsion of a high school student with ADHD and 504 services is upheld and the student's discrimination suit is dismissed. Under 504, a district must evaluate a student prior to imposing a significant change of placement, including disciplinary removals. When the student here was involved in a "threatening confrontation" with a classmate, the district convened a team and concluded that the student's misconduct did not have "a direct or

substantial relationship" to his disability. The student's claim that the district should have assessed whether his conduct merely "bore a relationship" to his ADHD is rejected where 504 does not include guidelines for making manifestation determinations but does provide that a district's compliance with the procedural safeguards of the IDEA is one means of meeting Section 504's evaluation requirement. Here, the evidence showed that the district appropriately followed its evaluation procedures, which mirrored the procedural safeguards outlines in the IDEA regulations.

B. H.A.B. v. Bertha-Hewit Pub. Schs., 70 IDELR 220 (D. Minn. 2017). The court held that the school district did not exclude the parent of a fourth-grader with Down syndrome from the IEP process by failing to consistently document the student's removals from the general education classroom. The court observed that although the district "could have done more" to document the student's behavioral problems, the failure to consistently document the student's removals from the general education classroom did not impede the parent's participation in the IEP process. When district staff did document the removals, the information appeared in places such as behavioral charts or a communication notebook. The court acknowledged that the parent had a valid interest in the information she sought. "Particularly in the circumstances present here -- where an IEP provides school staff discretion to remove a student from the mainstream environment based on disruptive behaviors and the student is non-verbal -- it is reasonable for a parent to seek specific information about the extent of such removals and the [district's] attempts to respond to behaviors in the mainstream with appropriate interventions before the removals occurred." However, the court observed that no provision of the IDEA required the district to document the student's removals from the mainstream setting. Thus, while the parent would have had a right to examine such records if they existed, the court concluded that the district had no obligation to generate those records upon the parent's request.

BULLYING/ HARASSMENT

A. Hale v. Independent Sch. Dist. No. 45, 69 IDELR 96 (W.D. Okla. 2017). Parent's complaint pursuant to Section 1983 is dismissed where it failed to allege a "conscience-shocking" disregard on the part of the ED student's middle school teachers and administrators of peer harassment. To establish that the district had increased the student's vulnerability to harassment, intimidation and bullying, the parent was required to show that district employees knowingly placed the student at substantial risk of serious, immediate and proximate harm. Although the claim was that school employees disregarded reports of peer bullying or told him to "deal with it," such actions are not sufficient to be conscience-shocking, as the potential or actual harm created must reach a "high level of outrageousness."

B. C.M. v. Pemberton Township High School, 69 IDELR 134 (D. N.J. 2017) (unpublished). Section 504/ADA claims are dismissed where parent failed to allege the ADHD high schooler's exclusion from a district program, service or activity on the basis of disability. The claims here address two incidents that occurred four months apart—one

in which the student injured her knee after another student allegedly tripped her and one in which a schoolmate allegedly bit her. However, there is no statement as to how the student has been denied equal access to educational opportunities or benefits as a result of these two incidents.

ELIGIBILITY

A. D.B. v. Ithaca City Sch. Dist., 70 IDELR 1 (2d Cir. 2017). Parent's contention that the district's proposed IEP was not appropriate because it did not recognize the student's disability specifically as a "nonverbal learning disorder" is rejected. NVLD is not formally recognized as a psychiatric diagnosis by medical literature or by the state of New York. Accordingly the district's failure to specifically identify the disability in the IEP does not compel a finding that the district does not understand the nature of the student's disability or the extent of her needs. Thus, the lower court's dismissal of the parent's private residential school reimbursement claim is affirmed.

B. D.L. v. Clear Creek Indep. Sch. Dist., 70 IDELR 32 (5th Cir. 2017) (unpublished). At the time that the district determined that the student with anxiety, depression and ADHD was not eligible for IDEA services in 11th grade, the student was excelling academically and socially. A student with an impairment is not eligible under the IDEA unless there is an academic need for special education services. In determining such need, the district must consider then-current performance and cannot find a student eligible based solely on concerns that the student might require special education services at some point in the future. While the student had received services during his freshman and sophomore years based upon suicidal ideation, declining grades and difficulty with interpersonal relationships, he was dismissed for special education just before the beginning of his junior year based on his academic and social progress. Indeed, the student earned A's in all of his classes, was rarely tardy or absent, and scored average on his college entrance exams. In addition, teachers praised his comportment and academics. Thus, none of the evidence available at the time of the eligibility determination suggested a continued need for services.

C. G.D. v. West Chester Sch. Dist., 70 IDELR 180 (E.D. Pa. 2017). Intellectually gifted third-grader with an anxiety disorder is not eligible under the IDEA for services and the district's determination that there is no need for services is upheld. The school psychologist's evaluation report was not deficient, when the psychologist spoke with the student's therapist two weeks before issuing an evaluation report. The psychologist testified that the therapist did not tell her that the student could not return to school but, instead, told her that the student was able to hold it together at school and that the behaviors at issue were displayed in the home. Further, the therapist's characterization of the school as "an unhealthy environment" for the student was based on the student's mistrust of her assigned school counselor. The school psychologist recognized, however, that the student needed a trusted adult on campus and indicated that the district could put that support in place. Thus, the school psychologist properly considered the private therapist's input, and the district adequately addressed the student's anxiety by developing a Section 504 plan.

EXTENDED SCHOOL YEAR SERVICES – SEA COMPLAINT PROCESS

In re Complaint Brought on Behalf of Student and All Students in the Functional Skills Program at Halverson Elementary School, Independent School District No. 241, 70 IDELR 262 (Minn. App. 2017)

This is an appeal of a special education complaint decision issued by the Minnesota Department of Education ("MDE"). On August 8, 2016, a parent of a non-qualifying student filed a complaint with MDE claiming that the district failed to follow the law in determining the Halverson Elementary School students' needs for ESY services during the summer of 2016. The parent specifically alleged the district did not offer ESY to students with special needs for the summer of 2016 *unless* they showed academic regression throughout the year. The parent further asserted that the district told parents that even if the student would have qualified in the past based upon "self-sufficiency," this year (2016), the students must show academic regression or they would not qualify for ESY. The district told MDE it had not adopted a new policy concerning ESY, but acknowledged that it had provided new training to its staff concerning the requirements for a student to be eligible for ESY services. As part of MDE's complaint investigation, the district provided a copy of slides presented at an ESY training session. MDE also requested to interview seven staff members knowledgeable about the relevant events.

One of the training slides presented to staff as part of a presentation entitled "ESY October 2015" stated that ESY eligibility should be based on "1) Regression/Recoupment ... AND/OR[;] 2) Self-sufficiency ... AND[;] 3) Unique Need." (The slide also specifically states: "Student[s] should NOT be qualifying for Unique Need alone."

MDE conducted one interview by phone and scheduled on-site interviews for the rest of the staff. However, the interviews did not take place because, according to the court's opinion, the investigator felt unsafe as a result of the superintendent's request to record the interviews and the superintendent's reportedly antagonistic behavior. MDE apparently made an internal decision to conduct the interviews "on paper" and not in person. Ultimately, MDE did not interview the remaining members of staff, either in person or "on paper."

Based evidence it gathered in the investigation, MDE held that the district committed four violations: (1) it "failed to determine if all students were in need of ESY services" in a manner consistent with Minn. R. 3525.0755; (2) it failed to ensure that each student's IEP team decided whether ESY services were necessary; (3) it failed to provide notice to parents of students 3 and 7 that there had been a change in the provision of ESY services; and (4) it unilaterally limited the types of services available to students receiving ESY services in the summer of 2016.

The district appealed the decision to the Minnesota Court of Appeals, and the court upheld the decision, stating: "The district concedes that its October 2015 training materials explicitly state that a student could not be eligible for ESY services on the basis of a 'unique need alone.' This is the wrong standard. The law provides that a student is entitled to ESY services if the services are required to prevent 'significant regression of a skill'; if the 'services are necessary for the

pupil to attain and maintain self-sufficiency'; or if 'the IEP team otherwise determines, given the pupil's unique needs, that ESY services are necessary.' Although the investigation was flawed, the School District's training materials were enough evidence to support MDE's conclusion.

IEP-IMPLEMENTATION –PARENT REQUEST FOR HOME INSTRUCTION

J.J.E. v. Indep. Sch. Dist. No. 279, 69 IDELR 105 (Minn. App. 2017)(unpublished).

The parent alleged that the district violated IDEA procedures by unilaterally changing the student's IEP so that it wouldn't have to provide home instruction. The court held that while the former district made a practice of providing the student's five weekly hours of one-to-one instruction in his home during the school day, the IEP was silent as to the location and timing of those services. Additionally, following a conciliation conference, the parent signed two prior written notices in which she agreed that the student would have a shortened school day instead of one-to-one instruction. Thus, at the time of the due process hearing before the ALJ, the student's IEP consisted of the former district's IEP and the revisions contained in the two PWNs. Nothing in these documents required at-home instruction. The court also held that the district's offer of school-based services was appropriate. Not only was the school a less restrictive setting than the student's home, but the student was also earning passing grades, making academic and behavioral improvements, and forming healthy peer relationships.

PROCEDURAL VIOLATIONS

A. S.H. v. Tustin Unif. Sch. Dist., 69 IDELR 176 (9th Cir. 2017) (unpublished). The fact that the 13 year-old's IEP team made many changes to the IEP during many meetings with the parents reflected sufficient participation on the parents' part. At least one parent participated in each of the six IEP meetings and the team made several changes to the proposed IEP after the parents provided their input. The parents' failure to consent to the student's placement, either during or after the meetings, did not demonstrate a lack of participation. Just because the parents and other IEP team members did not actually voice concerns about the IEP at the final meeting does not mean they did not have the opportunity or information necessary to do so. In addition, any failure on the part of the district to provide PWN of the proposed placement was harmless in light of the parents' extensive participation (the meetings, according to the hearing officer's decision, contained about 20 members and six meetings were held between October 2012 and March 2013 over a period of more than 18 hours).

B. Jackson v. Chicago Pub. Schs., 70 IDELR 33 (N.D. Ill. 2017). Where the district took 97 school days to finalize the initial IEP for a preschooler, it was in violation of the state's 60-day timeframe. However, the delay stemmed from the district's efforts to include the parent in the IEP process. Here, the district notified the parent of an IEP meeting within the 60-day period, but the parent did not attend; nor did the parent attend any of the four additional IEP meetings that the district scheduled over the following 10 weeks. The district was correct to prioritize parent participation over the state timeframe, and it

would be inconsistent with Supreme Court authority to penalize the district when it was unable to complete the IEP within the deadline because it went out of its way to include the parent in the development of her child's IEP. The district developed the IEP without the parent only after she failed to attend the fifth meeting it had scheduled to discuss her son's program.

INDEPENDENT EDUCATIONAL EVALUATION

A. Avila v. Spokane Sch. Dist. 81, 69 IDELR 204 (9th Cir. 2017) (unpublished). District's reevaluation of student for SLD was appropriate and parents' request for an IEE is rejected. The fact that the school district's reevaluation of the student with autism did not specifically evaluate for dyslexia and dysgraphia did not make it inappropriate. The reading and writing assessments conducted covered a variety of disorders in addition to SLDs and satisfied the district's duty to evaluate the student in all areas of suspected disability. The district did not refer to specific reading and writing disorders but, instead, evaluated for "specific learning disabilities," which covers a number of reading and writing difficulties.

B. West Chester Area Sch. Dist., 69 IDELR 91 (E.D. Pa. 2017). Because school district's methodology in conducting an evaluation of a third-grader with a gifted IEP is flawed, parents are entitled to a publicly funded IEE. The district's argument that it complied with the IDEA's procedural requirements for evaluations is rejected, where the reasons for finding the district's evaluation was flawed included: 1) the student had more difficulty comprehending expository works than narrative ones; 2) the evidence did not clearly indicate the student's reading level; 3) the student received "average" scores on standardized assessments of phonological processing and nonsense word decoding despite her exceptionally high IQ; 4) the district removed an IEP goal that required the student to read at a 4th -grade level; and 5) teachers and evaluators indicated that the student rushed through work in a way that might skew assessment results. Thus, the district's evaluation left "some doubt" about whether the student had a previously masked SLD.

C. A.A. v. Goleta Union Sch. Dist., 69 IDELR 156 (C.D. Cal. 2017). Parents are not entitled to reimbursement for a neuropsychological evaluation that cost $6,000. Because the parent is the party seeking relief, she bore the burden of proving that there was a need for an exception to the district's $4,500 fee cap. Indeed, the district gave the parent several opportunities to explain any unique circumstances, such as complex medical, educational, health or psychological needs that would warrant an exception to the district's capped rate. However, the parent responded only that the student had autism and used an augmentative communication device. In addition, the parent's advocate, who had a pre-existing relationship with the evaluator, had not been able to explain why she rejected the other evaluators on the district's list. Indeed, the parent selected the evaluator weeks before the advocate contacted other independent evaluators, which casts doubt on the parent's contention that their selection was necessitated by the lack of any other qualified evaluator. The parent's failure to show unique circumstances requires

affirmation of the ALJ's decision in the district's favor.

PRIVATE SCHOOL PLACMENTS – ENTITLEMENT TO FAPE AND DUE PROCESS HEARING

Special School Dist. No. 1 v. R.M.M., 861 F.3d 769 (8th Cir. 2017). This case involved the alleged failure of Minneapolis Public Schools ("MPS") to timely and appropriately identify and evaluate R.M.M. as a student with learning disabilities, and to provide her with timely and appropriate special education services. The School District provided special education services to students enrolled in both public and private schools located within the District. The student was a resident of MPS who was voluntarily enrolled in Annunciation Catholic School ("ACS"), a private school, from kindergarten through fifth grade.

During elementary school, the student struggled in the classroom, especially with reading. She received extra support and instruction at ACS, and she was referred to MPS for a special education evaluation in the fifth grade. That evaluation was completed on January 6, 2014, and it was determined that the student was eligible for special education services in the areas of reading and writing.

The individual service plan ("ISP") that was developed for the student provided for one hour of direct instruction, twice per week, at a MPS school located near ACS, to which the student would be bused during the middle of the school day. In order to receive these services, R.M.M. was enrolled in MPS in February 2014 on shared-time basis. The extra instruction commenced in March 2014, but R.M.M.'s parents declined further services after only four sessions. ACS subsequently informed the parents that it could not meet R.M.M.'s needs and encouraged them to enroll the student in MPS. The parents complied and enrolled the student in MPS, and requested a due process hearing.

At issue in the due process hearing was whether the School District denied the Student a FAPE when it refused or failed to propose an IEP reasonably calculated to meet Student's unique needs resulting from her disability and to enable her to be involved in and make progress in the general education curriculum after she was determined to be a child with a disability in January 2014.

MPS argued that parents in Minnesota who enroll their children in private school do not have the right to a due process hearing on issues other than child find.

The Administrative Law Judge (ALJ) denied the motion and later held that MPS denied the Student a FAPE when it proposed an individualized services plan (ISP) that was not reasonably calculated to meet the unique needs of the student was not designed to enable her to be involved in and make progress in the general education curriculum. As compensatory education, the ALJ ordered MPS to provide or pay for a set amount of additional instruction for R.M.M. in reading, writing, and mathematics. The ALJ also dismissed the parents' "child find" claim because MPS had actually identified the student as eligible for special education. Bothe MPS and the parents' appealed the ALJ's ruling to the United States District Court for Minnesota.

In that court, MPS argued that: (1) the parents were not entitled to a due process hearing on a FAPE claim because voluntarily enrolled private school children with disabilities are not entitled to a due process hearing, except on matters of identification or child find. Additionally,

under the IDEA, such students are not entitled to a full FAPE.

Citing *Independent School District No. 281 v. Minnesota Department of Education*, 743 N.W.2d 315 (Minn. App. 2008), the court held that not only are parentally-placed private school students in Minnesota entitled to a full FAPE (with the exception that the school district may determine the location at which to provide the special instruction and services), they also are entitled to a due process hearing regarding whether a FAPE was, in fact, provided.

[NOTE: MPS also argued that even if R.M.M. was entitled to a due process hearing on her FAPE claims, those claims were barred under *Thompson v. Special School District No. 1*, 144 F.3d 574 (8th Cir. 1998). In *Thompson*, the Eighth Circuit held that a student had no right under the IDEA to challenge the educational services provided by a school district because he was not a student in that school district when he requested the due process hearing. MPS asserted that *Thompson* applied because, prior to requesting a due process hearing, R.M.M.'s parents disenrolled R.M.M. from MPS when she declined services. The court rejected this argument, finding that, unlike in *Thompson*, the school district that was responsible for the allegedly problematic services (MPS) is the same school district that was responsible for the requested due process hearing (MPS). And, the request for the due process hearing would have put MPS on notice of the perceived problem with the educational services it had provided to R.M.M., and thus would have provided MPS with the opportunity to address the alleged problem].

MPS appealed to Eighth Circuit Court of Appeals and the court upheld the district court decision. In a case of first impression for a federal appellate court, the 8th Circuit held that parentally placed private school students have a right to FAPE under Minnesota law. Although parentally placed private school students are not entitled to FAPE under the IDEA, the IDEA establishes the minimum requirements that states must follow; states are free to impose additional requirements for the provision of FAPE. Following the 1997 reauthorization of the IDEA, which clarified that parentally placed private school students with disabilities were no longer eligible for FAPE, the Minnesota legislature amended the state's education code to require the provision of "special instruction and services" to all resident students with disabilities; a separate provision of the education code defines that term to mean "FAPE."

Furthermore, the court noted that Minnesota's education code expressly precludes a district from denying special instruction and services to a resident who attends a public school on a "shared time basis" because she is also enrolled in a private school. "In other words, because [the district] deemed [the student] eligible for a FAPE, Minnesota law requires [the district] to provide her a FAPE on a shared-time basis." The 8th Circuit explained that this "shared time" requirement also limited a district's liability for the provision of FAPE. While the district would be responsible for providing the student FAPE during the hours she was in public school, it had no obligation to monitor the services the student received in the private school setting.

As for the district's claim that parentally placed private school students do not have the right to request a due process hearing, the 8th Circuit pointed out that the IDEA allows parents to file due process complaints alleging a denial of FAPE. The fact that the student in this case only had a right to FAPE under state law did not prevent her parents from bringing a due process complaint against the district.

TRANSITION SERVICES

A. A Transition Guide to Postsecondary Education an Employment for Students and Youth with Disabilities" was jointly issued in January 2017 by OSEP and the Rehabilitation Services Administration. The Guide is very comprehensive and provides an overview of basic transition topics, including references to pertinent provisions of applicable law and provides additional resources for secondary transition personnel, as well as families and other transition agency partners. Among some of its tips, it includes the suggestion that districts may sometimes use IDEA Part B funds to pay for college classes consistent with a student's entitlement to FAPE and as part of transition. The Guide also offers examples of how districts might better serve students as they transition to adult life by offering suggestions of "best practices." The Guide also contains a glossary of terms taken from the law, which may be useful to those involved in the provision of transition services to students with disabilities.

B. Letter to Anonymous, 69 IDELR 223 (OSEP 2017). The IDEA's requirement to annually update IEPs applies to transition goals and services and requires districts to carefully consider whether each student's transition plan still matches up with his or her interests and preferences. It is reasonable to expect that a student's postsecondary goals will change over time, as coursework, community experiences or college/career preparation activities are likely to spark new interests or changed preferences. Thus, it is important for IEP teams to review transition goals and services annually to determine whether they are still affording FAPE to a student. While it is possible that an IEP team could conclude that no changes are necessary, it must carefully consider whether the existing IEP's postsecondary goals and transition services remain appropriate to support the student in working toward what he/she hopes to achieve after leaving high school.

PARTICIPATION IN NONACADEMIC/EXTRACURRICULAR ACTIVITIES

A. A.H. v. Illinois High Sch. Ass'n, 70 IDELR 92 (N.D. Ill. 2017). Under 504 and ADA, school districts and athletic organizations are required to provide students with disabilities reasonable modifications that will enable them to equally participate in school-sponsored events and programs, including athletic competitions. However, a modification is reasonable only where it does not fundamentally alter the nature of the competition or program. Here, the high school student with CP asked that the association establish "realistic qualifying times" for para-ambulatory athletes and to create a paraambulatory division for its annual 5-kilometer track competition, known as its "Road Race." These requested accommodations were unreasonable because they would substantially lower the standards necessary to compete and place in the Race's finals, giving the student with a disability an unfair competitive advantage and would strip the "Road Race" of its title as the most competitive track race in the state. In addition, there is no evidence that the association's standards or rules deprive the student of an opportunity to qualify for the race. Rather, it appears that the association consistently offers students with disabilities the same opportunity to qualify for the Road Race as it provides to runners without disabilities. Thus, the student's failure to accommodate claims challenging the tournament's qualifying standards were dismissed.

OSERS

#	Program	Title	Date Issued
1	Rehab. Act	Transition Programs & Services: High School/High Tech & Vocational Rehabilitation. IM 07-08	7/23/2007
2	Rehab. Act	Factors State Vocational Rehabilitation Agencies Should Consider When Determining Whether a Job Position Within a Community Rehabilitation Program is Deemed to be in an Integrated Setting for Purposes of the Vocational Rehabilitation Program. (TAC-06-01) TAC 06-01	11/21/2005
3	Rehab. Act	Whether Centers that do not Receive Title VII, Part C Grants are Included as Centers for Independent Living Under the Rehabilitation Act of 1973, as amended and the Implications for SILC Composition, Network of Centers, and Part B and Part C Funding. (PD 03-06) https://www2.ed.gov/policy/speced/guid/rsa/pd-03-06.pdf	8/8/2003
4	Rehab. Act	Satellite Centers for Independent Living. https://www2.ed.gov/policy/speced/guid/rsa/pd-02-03.pdf	7/3/2002
5	Rehab. Act	Retirement of Certain Policy Issuances. IM 00-30	6/30/2000
6	Rehab. Act	Information on the Provision of Vocational Rehabilitation Services to Individuals with Hearing Loss (Deaf and Hard of Hearing). IM 00-21	3/28/2000
7	Rehab. Act	Employment Goal for an Individual with a Disability. (PD 97-04) https://www2.ed.gov/offices/OSERS/RSA/guidance/PD-97-04.pdf	8/19/1997
8	Rehab. Act	What a Designated Client Assistance Program Agency Must Do to Satisfy the Mediation Procedures Requirement. (TAC 97-01) https://www2.ed.gov/policy/speced/guid/rsa/tac-97-01.pdf	2/24/1997
9	Rehab. Act	Retirement of Policy Issuances. PD 95-06	7/12/1995
10	IDEA	OSEP Dear Colleague Letter: To Chief State School Officers (CSSOs) on Local Educational Agency (LEA) Maintenance of Effort. http://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/lea-moe-3-13-14.pdf	3/13/2014
11	IDEA	Final Regulations Related to Parental Consent for the Use of Public Benefits or Insurance — One-page Summary. https://www2.ed.gov/policy/speced/reg/idea/part-b/idea-part-b-parental-consent--one-pager.pdf	3/18/2013
12	IDEA	OSEP Dear Colleague Letter: Preschool Least Restrictive Environment (LRE). http://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/preschoollre22912.pdf	2/29/2012

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13	IDEA	OSEP Memo: 11-06 American Recovery and Reinvestment Act (ARRA) Monitoring Announcement. https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/osep11-06arramonitoringannouncmentmemo.pdf	12/6/2010
14	IDEA	Implementing Response to Intervention (RTI) Using Title I, Title III, and CEIS Funds. No Link Available.	8/25/2009
15	IDEA	Guidance on Procedural Safeguards and Due Process Procedures for Parents and Children with Disabilities. http://www2.ed.gov/policy/speced/guid/idea/procedural-safeguards-q-a.pdf	6/11/2009
16	IDEA	OSEP Memo 08-08: Implementing the Funding Formula Under the IDEA—Year of Age Cohorts for Which FAPE is Ensured. No Link Available.	5/2/2008
17	IDEA	OSEP Memo: 07-10 Interpretation of 34 CFR §300.154(d)(2)(iv)(A). http://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/osep07-10interpretationof34cfr300154.pdf	5/3/2007
18	IDEA	Questions and Answers On Highly Qualified Teachers Serving Children With Disabilities. http://idea.ed.gov/uploads/07-0006.HQT.pdf	1/29/2007
19	IDEA	Questions and Answers on Serving Children with Disabilities Placed by Their Parents at Private Schools. https://www2.ed.gov/policy/speced/guid/idea/faq-parent-placed.pdf	3/27/2006
20	IDEA	Dear Colleague Letter addressing administrative costs added to the Individuals with Disabilities Education Act (IDEA) by the 2004 Amendments. https://www2.ed.gov/policy/speced/guid/idea/letters/2005-3/dearcolleague072505admin3q2005.pdf	7/25/2005
21	IDEA	OSEP Memo 05-10 Notice of Proposed Rulemaking (34 CFR Part 300, 301, and 304), Assistance to States for the Education of Children with Disabilities; and Service Obligations Under Special Education – Personnel Development to Improve Services and Results for Children with Disabilities. No Link Available.	7/22/2005
22	IDEA	OSEP Memo: 05-09 Obligations of States and Local Educational Agencies to Parentally-placed Private School Children with Disabilities. http://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/osep05-09childrenwithdisabilitiesplacedinprivateschoolsbytheirparents.pdf	6/27/2005
23	IDEA	OSEP Memo 04-09 Implementation of OSEP's Continuous Improvement and Focused Monitoring System During Calendar Year 2004. www.ed.gov/policy/speced/guid/idea/monitor/osep-memo-04-09.doc	4/6/2004

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24	IDEA	OSEP Memo 04-04 New Technical Assistance Initiative. No Link Available.	1/29/2004
25	IDEA	OSEP Memo 03-09 New Technical Assistance Initiative. No Link Available.	8/18/2003
26	IDEA	OSEP Memo 03-05 Implementation of OSEP's focused monitoring during 2003. No Link Available.	4/8/2003
27	IDEA	OSEP Memo 02-10 Medicaid and upcoming compliance deadlines under HIPAA and ASCA. No Link Available.	9/26/2002
28	IDEA	OSEP Memo 02-06 Implementing new funding formula under IDEA. https://www2.ed.gov/policy/speced/guid/idea/letters/2002-2/osep0206-2q2002.pdf	4/26/2002
29	IDEA	OSEP Memo 01-09 Information about new childhood regulations under the SSI Program. https://www.ed.gov/policy/speced/guid/idea/letters/2001-2/osep0109ssi.doc	5/24/2001
30	IDEA	OSEP Memo 01-06 Guidance on including students with disabilities in assessments. https://www2.ed.gov/policy/speced/guid/idea/letters/2001-1/osep0106assess.pdf	1/17/2001
31	IDEA	OSEP Memo 01-05 Questions and Answers on Mediation. No Link Available.	11/30/2000
32	IDEA	OSEP Memo 00-24 Q&A State/District wide assessment. No Link Available.	8/24/2000
33	IDEA	OSEP Memo 00- 20 Complaint resolution procedures under Part B. No Link Available.	7/17/2000
34	IDEA	OSEP Memo 00-19 IEP guidance. No Link Available.	6/30/2000
35	IDEA	OSEP Memo 00-17 Implementing the new funding formula under IDEA. https://www2.ed.gov/policy/speced/guid/idea/letters/2000-2/osep0017disfunds2q2000.pdf	6/26/2000
36	IDEA	OSEP Memo 00-16 Review of eligibility documents and issuance of grant awards. http://www2.ed.gov/policy/speced/guid/idea/letters/2000-2/osep0016grantawards2q2000.doc	6/13/2000
37	IDEA	OSEP Memo 00-14 Qs & As on obligations of public agencies serving children with disabilities placed by their parents in private schools. www.cesa7.org/sped/discoveridea/topdocs/nichcy/private.htm	5/4/2000

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38	IDEA	OSEP Memo 00-10 Revised Part B funding formula information request. No Link Available.	3/14/2000
39	IDEA	OSEP Memo 00-08 School districts, State schools, and educational services agencies selected for National assessment study. No Link Available.	1/19/2000
40	IDEA	OSEP Memo 00-07 OSEP Memo 00-Enhancing Coordinated Services Systems. No Link Available.	1/13/2000
41	IDEA	OSEP Memo 00-04 Clarification on State eligibility and public participation. No Link Available.	11/3/1999
42	IDEA	OSEP Memo 00-03 School districts, State schools, and educational services agencies selected for National assessment study. No Link Available.	11/3/1999
43	IDEA	OSEP Memo 99-14 Guidance related to State Program improvement Grants. No Link Available.	7/30/1999
44	IDEA	OSEP Memo 99-12 NPRM for charter school expansion act. No Link Available.	6/28/1999
45	IDEA	OSEP Memo 99-11 Final regulations. No Link Available.	4/27/1999
46	IDEA	OSEP Memo 99-09 Schools with IDEAs that work. No Link Available.	3/29/1999
47	IDEA	OSEP Memo 99-01 Continuous Improvement monitoring process. No Link Available.	1/1/1999
48	IDEA	OSEP Memo Continuous Improvement monitoring process. No Link Available.	10/2/1998
49	IDEA	OSEP Memo 98-13 OSEP Response to Comment on the IDEA forms. No Link Available.	9/16/1998
50	IDEA	OSEP Memo 98-08 Effective date of the new IEP requirements. No Link Available.	4/28/1998
51	IDEA	OSEP Memo 98-04 Guidance related to State Program improvement Grants. No Link Available.	2/26/1998
52	IDEA	OSEP Memo 98-01 information related to statutory changes to Part H. No Link Available.	1/7/1998
53	IDEA	Joint DCL Including Students with Disabilities in all Educational Reform Activities. https://www2.ed.gov/about/offices/list/ocr/docs/asses902.html	9/29/1997

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54	IDEA	OSEP Memo 97-7 Initial Discipline Guidance related to removal of children with disabilities for ten school days or less. https://www2.ed.gov/policy/speced/leg/idea/97-7.pdf	9/19/1997
55	IDEA	OSEP Memo 97-5 Changes in Part B of IDEA as required the IDEA amendments of 1997. https://www2.ed.gov/policy/speced/leg/idea/97-5.pdf	6/17/1997
56	IDEA	OSEP Memo 95-2 Information on the Secretarial Review Process. http://baby.indstate.edu/iseas/genrl-in8.html	10/6/1994
57	IDEA	OSEP Memo 94 -19 Availability of draft monitoring reports under FOIA. No Link Available.	4/28/1994
58	IDEA	OSEP Memo 93-16 Impact of the Cash Management Improvement Act on IDEA Part B State Grants for FY 1994. No Link Available.	7/21/1993
59	IDEA	OSEP Memo 93-09 Provision of services to Native American Children Aged Birth through Five Residing on Reservations. No Link Available.	1/12/1993
60	IDEA	OSEP Memo 92-20 Guidelines for Implementing Community-based Educational Programs for Students with Disabilities. No Link Available.	9/21/1992
61	IDEA	OSEP Memo 91-22 Summary of Comments of Special Education for Children with Attention Deficit Disorder. No Link Available.	6/21/1991
62	IDEA	OSEP Memo 90-17 & 90-17A Response to Pennsylvania Questions on Implementing a Birth Through Five Early Intervention Program. No Link Available.	6/1/1990
63	IDEA	OSEP Memo 90-16 Age of eligibility for FAPE of preschool aged children. No Link Available.	5/8/1990
64	IDEA	OSEP Memo 89-21 States responsibility to make FAPE available to certain Indian children. No Link Available.	6/19/1989
65	IDEA	OSEP Memo 88-17 Use of Tape recorders at IEP meetings. No Link Available.	4/15/1988
66	IDEA	OSEP Memo 86-13 The 12 percent limitation on handicapped children counted for allocation purposes. No Link Available.	3/18/1986
67	IDEA	OSEP Memo 85-23 Cooperation in transition initiative and parent training. No Link Available.	4/4/1985
68	IDEA	OSEP Memo 85-19 excess cost requirement under Part B. No Link Available.	2/5/1985

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69	IDEA	OSEP Memo 85-9 Grantback arrangements. No Link Available.	1/9/1985
70	IDEA	OSEP Memo 85-5 Use of EHA-B funds for equipment and certain costs allowable with prior approval. No Link Available.	10/9/1984
71	IDEA	Informal Letter to Chief State School Officers on Data Submissions Due During FY 1983. No Link Available.	8/31/1982
72	IDEA	Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving or Benefiting From Federal Financial Assistance; and Assistance to States for Education of Handicapped Children. https://www2.ed.gov/about/offices/list/ocr/docs/fapeinsurance.html	12/22/1980