2018-2019 Year in Review

Cases before the Federal District Court for Minnesota

N.D.S. v. Academy for Science and Agriculture (2018 WL 6201725, November 28, 2018)

In this case, a student who had previously qualified for special education experienced a series of challenges that prompted her parents to request a re-evaluation. That re-evaluation was completed by the charter school in December of 2015. In June of 2017, the student sustained a concussion that a doctor opined increased her frustration and cognitive difficulties. Her parents, represented by counsel, ask for an Independent Education Evaluation (IEE) based upon their disagreement with the 2015 evaluation. The District argued that the request for a hearing to force the District to pay for an IEE was beyond the two-year statute of limitations. The federal court remanded this issue to the hearing officer because the record did not show when the parents knew or should have known that the District allegedly acted unlawfully.

The Judge also wrote that "… N.D.S.'s parents' goal in this litigation is to force [the charter school] to pay for an IEE…" He noted the parents refused to state why they disagreed (and that is their right under the law), that the charter school offered to re-evaluate the student and the parents' refused expressly to force the charter school to pay for the IEE. The Court ruled that if the hearing officer found that the claim was not barred by the statute of limitations, he must order that the charter school either provide the IEE or request a hearing to defend its December 2015. The IEE would need to be focused on whether the December 2015 evaluation was appropriate in 2015 – not in 2017 after the student had a sustained a concussion.

Rosaria M. and John M. individually and as parents and next friends of F.M., a minor v. The Madison City Board of Education, 2018 WL 1570200 (United State District Court, N.D. Alabama, Northeastern Division, March 30, 2018)

Background information:

F.M. was a ten-year-old first-grader with a specific learning disability. The School District developed an IEP roughly halfway through the school year. Despite the IEP, the IEP team informed F.M.'s Parents that F.M. would have to remain in the first grade because F.M. "did not meet the state's general education standards for advancement to the second grade." The Parents disagreed with this decision. Upon the Parents' request, F.M. was provided with extended school year (ESY) services with the hope that F.M. could test into the

second grade after ESY. The testing after ESY showed that F.M. still didn't qualify for advancement to the second grade. After being placed in first grade again, the Parents removed F.M. from the School, enrolled F.M. in an online educational program and filed a due process complaint.

Issue:

The Parents alleged that the School Board failed to efficiently evaluate F.M. in every area of her disability and that her IEP did not provide her with a free appropriate public education (FAPE). The hearing officer decided that the School Board did not deny F.M. a FAPE. The Parents disagreed with the hearing officer's decision and requested review of the decision by filing a civil action. The Parents alleged that the School Board failed to provide their daughter, F.M., with a FAPE.

An interesting issue the Parents argued for, is that the School Board did not discuss F.M.'s need for ESY, even after the fact that F.M. was held back from the second grade. Thus, the Parents alleged that F.M. was improperly denied ESY. However, the record showed that F.M.'s inability to proceed to the second grade did not necessarily qualify her for ESY. This is so, because Madison City does not use ESY as a program to help a student who is unprepared for the next grade. ESY is used to prevent students who have IEPs from regressing from their benchmarks and goals. While, F.M. was held back, she did not regress from her benchmarks and annual goals.

The Court applied the *Endrew F.* standard while reviewing the case. The Court interprets the *Endrew F.* standard as "when the state identifies a qualified student, the individualized education program (IEP) is the primary tool by which a state educational agency accomplishes its mandate to provide disabled students with an appropriately tailored education." Furthermore, the Court states that an IEP is created with the input of the student's parents or guardians and the student's general and special education teachers. If parents and educational staff disagree on what an IEP should contain, the parent or parents may present their grievance to a hearing officer at a due process hearing. The Court also made a point to acknowledge that the Court understands "it may not review a school's efforts against an 'ideal-in-hindsight' standard."

Holding:

The Court applied the *Endrew F.* standard when it stated "this Court must attempt to gauge whether F.M.'s IEP was designed to challenge her and 'to enable her to make progress appropriate in light of [her] circumstance' . . . The Court must determine whether the goals and benchmarks designated in the plan were 'appropriately ambitious in light of [the student's] circumstances.'" The Court found that because F.M. was transferred to the

School after the year had begun, F.M. had limited time to fully achieve any progress under her IEP plan. However, F.M. was withdrawn from the School before she could complete her year-long IEP; therefore, F.M.'s progress did not mean the IEP was inadequate. Thus, the Court decided that the Parents did not show that the School Board violated the Individuals with Disabilities Education Act (IDEA) by denying F.M. a free appropriate public education (FAPE).

Sophie G., a minor child, by and through her parent and next friend, and Kelly G. v. Wilson County Schools, 2018 WL 3409208 (United States Court of Appeals, Sixth Circuit, July 12, 2018)

Background information:

Sophie G. was a minor child with Autism and developmental delay. She was not fully toilet trained and required a one-on-one attendant to assist with diapering. Sophie G.'s Parent, Kelly, wanted to enroll Sophie in a childcare program called Kid's Club, because it was less expensive than nonsubsidized after-school care. Kelly was told that Sophie would not be eligible to attend Kid's Club because she was not toilet trained.

Issue:

The Plaintiffs/Appellants alleged that Sophie was denied access to Kid's Club because of her disability. Sophie has an individualized education program (IEP) at Wilson County Schools. Wilson County Schools offers the subsidized childcare program that is referred to as Kid's Club. The Plaintiffs sought relief in the form of damages, attorney's fees, and an order that requires Wilson County to follow the accessibility requirements under relevant law.

Holding:

While reviewing this case, the Sixth Circuit would have applied the *Endrew F.* standard, but found that it did not apply. The Sixth Circuit determined that the *Endrew F.* standard did not apply to this case because "admission to an after-school childcare program is not required for Sophie to receive educational benefits at school, and nothing in Plaintiffs' Complaint alleges admission to the Kid's Club is required for her education." Moreover, the Sixth Circuit found that the, "Plaintiffs' complaint seeks access to subsidized childcare on equal terms, and not redress for the denial of a FAPE . . . Therefore, the district court erred in finding Plaintiffs were required to exhaust administrative remedies under the IDEA." Thus, the Sixth Circuit reversed the District Court's dismissal and remanded for further proceedings.

Cases before the United States Court of Appeals for the Eighth Circuit

The Estate of Chandler J. Barnwell, by and through his parents, Michael and Anna Barnwell v. Linda Watson, Dr., EdD, Superintendent of the School Board of the Little Rock Independent School District, 880 F.3d 998 (January 26, 2018)

Background information:

Chandler Barnwell—who was diagnosed with Attention Deficit Hyperactivity Disorder, Depression and Anxiety, Oppositional Defiant Disorder, and Asperger's Disorder—took his own life at the age of 16. It is believed by Chandler's Parents that he was a victim of bullying, which pushed him to commit suicide.

From grade school to 9th grade, Chandler had attended five different schools. The incident that is believed to have caused his death took place at Parkview Arts Science Magnet High School. Chandler started 9th grade at Parkview Arts Science Magnet High School in August 2010. While attending school, Chandler expressed to his adult peers that he wanted to graduate early or take his GED to leave the school, but he never specifically stated he wanted to leave because of being bullied.

Moreover, the incident that may have caused him to commit suicide happened in class on December 7th. While in class, Chandler was harassed by another student and in response to the bully, Chandler made a mean comment to the student. The student responded to Chandler's comment by allegedly stating, "go home and kill yourself." And that night, after his Parents had left for an appointment, Chandler took his life.

After Chandler took his life, information came out from his fellow classmates that Chandler was bullied constantly while attending Parkview Arts Science Magnet High School. After Chandler's suicide, his Parents tried to start an investigation with the Principal, Booth, but Booth denied Chandler was ever bullied at school.

Issue:

After Chandler's suicide, the Barnwells, under Section 504 of the Rehabilitation Act, alleged that the School discriminated against Chandler's disability, when it failed to protect him from being bullied at School. The United States District Court for the Eastern District of Arkansas – Little Rock found no evidence that supported the Barnwells' claim. In response, the Barnwells' appealed the District Court's decision.

The Barnwells argued that the School's employees did not address the allegations that Chandler was bullied or harassed at school. In addition,

Principal Booth did not conduct a sufficient investigation after Chandler's death, did not provide counselors to those grieving, and silenced individuals who wanted to discuss Chandler's suicide.

Holding:

After the Eighth Circuit reviewed the case, the Court agreed with the District Court's decision that there was no evidence that School officials knew of any incident of Chandler being bullied. However, the School did know about one incident that occurred on October 7th, which the School responded to right away. In addition, the Eighth Circuit disagreed with the Plaintiffs' claim that a school may discriminate against a disabled student in violation of Section 504 after the student's death, by not investigating the alleged harassment that might have happened before he died.

Carrie-Anne Smith, in her individual capacity; G.S., next friend Carries-Anne Smith v. Rockwood R-VI School District; Eric Knost, 895 F.3d 566 (July 11, 2018)

Background information:

G.S., a student diagnosed with Autism Spectrum Disorder, Tourette Syndrome, Emotional Disturbance, Major Depression, Obsessive-Compulsive Disorder, and Attention Deficit Hyperactivity Disorder, was suspended from school for ten days. After G.S.'s suspension, Rockwood, the St. Louis District and G.S.'s Individualized Education program (IEP) team conducted a manifestation hearing to determine if "G.S. was suspended for conduct that manifested from his disability." Based on G.S.'s behavior intervention plan, G.S. was to be readmitted to school or have a change in placement; instead the Superintendent suspended G.S. for 180 days.

Issue:

The Plaintiffs alleged that Rockwood R-VI School District violated the Individuals with Disabilities Education Act and the Rehabilitation Act. Furthermore, the Plaintiffs argued that G.S. was denied a public education when G.S. was suspended for 180 days. Additionally, the Plaintiffs argued "that the exhaustion requirement does not apply to these claims because plaintiffs sought money damages—a remedy not authorized by the IDEA."

Holding:

The Eighth Circuit Court of Appeals found that the Plaintiffs were in fact required to exhaust all administrative remedies and the Plaintiffs' failed to exhaust all administrative remedies. Thus, their claims have been dismissed.

Cases before the United States District Court, Minnesota

ISD No. 283 v. EMDH, 2019WL 201751 (8th Cir. January 15, 2019)

This case is being appealed to the Eighth Circuit Court of Appeals. The Student was gifted and did well academically despite a lot of absences. She had multiple diagnosis ranging from adjustment disorder, generalized anxiety and depressive disorder to name a few. After a partial hospitalization, her diagnoses were depression and anxiety disorder. In March of 2015, the Student stopped attending school. The school did not refer her to the Student Assistance Team (one of the District's child-find activities) because when she was in school, she did well.

In grade nine, the same pattern of absence and partial hospitalization occurred. The District dis-enrolled her when she was in the hospital program. She was not referred for a special education evaluation. She was admitted to residential treatment.

In grade ten, she returned to the District and it created a 504 plan for her. The Court's decision mentions that the parent understood special education would not be appropriate for the Student because she was gifted. The Student was evaluated for special education and did not qualify. The parent asked for an over-ride, however, the District did not do so because it stated that she did not special education. A hearing officer found that the Student had not been timely evaluated and that she was denied a FAPE. The federal district court agreed that the Student's mental health diagnoses directly affected her school attendance and she was eligible under the Other Health Disability and the Emotional Behavioral Disorder criteria.

E.D. v. Palmyra R-1 School District, 911 F.3d 938 (8th Cir. January 3,2019)

E.D. is a student with Down Syndrome. His parents rejected an IDEA evaluation and an IEP and asked instead for him to be in the general education classroom with a 504 Plan to allow him to use an iPad to compensate for his fine motor and speech delays. When the District declined to create a 504 Plan, the parents withdrew E.D. and brought a lawsuit in federal court under the ADA and Section 504 alleging discrimination. The 8th Circuit held that E.D. was required to exhaust his administrative remedies before filing a lawsuit because his claims stemmed from a concern about FAPE. The Court instructed that the two pertinent questions are: 1) could the student bring the same discrimination case against another public entity like a library? And 2) could an adult bring the same claim? If the answer to both questions is No then the complaint likely involves a question of whether a FAPE was provided and the student must first request a hearing on the issue of the provision of a FAPE/

Student A v. Math and Science Academy, OCR Case No. 05-18-1076 (May 21, 2018)

Issue:

Student A alleged that the Academy discriminated against Student A because of her disability when the Academy failed to implement Student A's Section 504 Plan. The Academy allegedly did not receive parental consent when it removed Student A from her Spanish class, and Student A was harassed by Academy staff on the basis of the Student's disability. Specifically, The Complainant alleged that Student A's PE/health teacher and Spanish teacher called Student A "special needs" in front of other students. The Complainant alleged that Student A's science teacher called Student A "very different than her other students." The Complainant also alleged that Student a's English teacher humiliated Student A by allowing other students to laugh at Student A while she struggled to read in front of the class. The Complainant alleged that the Student's 504 Coordinator told Student A that is she is different and "wasting her time being this way." Lastly, the Complainant alleged that the Academy's Director stated to Student A's Parents that the Academy could not put up with Student A's needs.

Holding:

Student A enrolled in the Academy with a 504 Plan from another school; therefore, the Academy followed their procedure and implemented the prior school's plan before the Academy had a chance to conduct their own observation period to determine whether or not the Student had additional needs that should be added to the 504 Plan. During this time, the Complainant argued that the 504 Plan was not being implemented. Moreover, after reviewing each teachers' understanding and implementation of Student A's accommodations, the Office for Civil Rights (OCR) found that the Academy did implement the Student's 504 Plan and correctly followed their procedures for when a transfer student already has a 504 Plan transfers to the schools.

The OCR found that Student A was removed from Spanish class for a few minutes while the class was reviewing an assignment that Student A had not completed yet. Additionally, OCR found that Student A's 504 Plan required her to be removed from the mainstream classroom in order for her to receive her accommodations. For example, Student A took her tests in a different location so she could receive additional time and have a reader present. Student A was also removed from the mainstream classroom to complete tests for her IEP evaluation. Thus, the OCR found that the Academy complied with Student A's 504 Plan and IEP evaluation process when the Academy removed the Student from the mainstream courses; therefore, the Academy did not wrongfully remove Student A from the mainstream classes.

Lastly, after speaking with each teacher who allegedly made discriminatory comments about Student A, OCR found no evidence that the

Academy staff harassed Student A based on her disability. The OCR did find that some incidents probably did occur, but there was not enough evidence to support how it occurred according to the Complainant. In addition, the Academy staff denied ever making the comments alleged by the Complainant.

*Booth Law Group represented the school in this matter.

Student A v. Aspen Academy, OCR Case No. 05-18-1095 (June 6, 2018)

Issue:

The Complainant alleged that the Academy discriminated against Student A on the basis of his UV allergy and asthma. The Complainant alleged that the Academy did not accurately develop Student A's 504 Plan in accordance to Section 504. Specifically, The Academy did not gather documentation or conduct an evaluation in accordance with Section 504 and failed to ensure decisions were made by staff who were knowledgeable about the Student, the meaning of the evaluation data, and the placement options. In Addition, the Complainant alleged that the Academy failed to implement the Student's Section 504 Plan relating to his UV allergy.

Holding:

The Office for Civil Rights (OCR) investigated and found insufficient evidence to support the Complainant's claim that the Academy discriminated against Student A on the basis of his UV allergy and asthma. OCR found that the Academy did develop Student A's 504 Plan in accordance to Section 504. The OCR found evidence that the staff who developed the 504 Plan were knowledgeable about the Student, the evaluation data, and the placement options. The OCR reviewed Student A's implementation of his 504 Plan and found that the Academy did implement his Plan. Evidence shows that the Academy implemented all of Student A's accommodations regarding reading/recording, field trips, bus/transportation, movement breaks, seating away from windows.

However, there are a couple things the Academy did not do that still did not deny Student A of a fee appropriate public education (FAPE). First, the Academy did not obtain the outdoor weather station that was required in the Student's 504 Plan. Instead, the Academy used an Accuweather Application to check the UV levels. Second, the Academy did fail to meet and develop a written plan for Student A's attendance at a field trip, but the Academy did still provide Student A with access to the field trip; thus, the Academy did not deny Student A of a FAPE. Third, the Complainant intended Student A's movement breaks-when the UV levels were 4 or higher-to include "walking to get milk or a snack, jumping, gym running, or game." Whereas, the Academy interpreted the

504 Plan differently and allowed Student A to walk around the school during movement breaks instead of having Student A specifically walk to get food, engage in a gym activity or game; however, the 504 requirements were still met. Furthermore, OCR concluded that the Academy did not discriminated against Student A on the basis of disability and the Academy did in fact implement his 504 Plan.

*Booth Law Group represented the school in this matter.

Student A v. Aspen Academy, OCR Case No. 05-18-1197 (August 8, 2018)

Issue:

The Complainant's first allegation is that the Academy discriminated against Student A because of his UV allergy and asthma when the Academy did not implement Student A's 504 Plan. Specifically, alleged that the Academy did not implement the 504 Plans regarding seating Student A away from windows, allowing movement breaks, reading and recording UV levels, "field trips, emergencies/drills, and bus/transportation." Also, the Complainant's second allegation is, the Academy discriminated against Student A when the Academy refused the Complainant's request for a special education evaluation. The Complainant third allegation is, the Academy retaliated against the Complainant for filing a complaint with the Office for Civil Rights (OCR) by refusing to allow the Complainant to meet with the Board of Directors, did not allow the Complainant to volunteer, did not allow the Complainant on school property and filed a No Contact Order. And lastly, did not allow the Complainant to attend Student A's Section 504 team meetings.

Holding:

In regards to Student A's Section 504 Plan, OCR found, as in the first OCR complaint No. 05-18-1095, that the Academy did in fact implement Student A's Section 504 Plan. The Academy even bought supplies to cover the classroom windows with to protect Student A from the UV, even though that was not in Student A's 504 Plan.

In regards to the second allegation, OCR found that the Academy did respond to the Complainant's request to conduct a special education evaluation on Student A. Evidence shows that the Academy's Special Education Coordinator reached out to the Complainant and her attorney to set up an initial evaluation meeting; however, the Complainant and her attorney never responded.

In regards to the retaliation allegations, OCR found insufficient evidence to support the Complainant's claim that the Academy retaliated against her by

refusing to allow her to meet with the Board of Directors. OCR found that the Complainant never followed the Board's registration requirement to speak at a Board meeting; therefore, the Board could not have refused to meet with the Complainant since she never requested a meeting.

In addition, OCR found that the Academy did not refuse to meet with the Complainant out of retaliation, but refused to meet because the Complainant would try to meet with staff after her volunteer shift. The Academy had to refuse to meet with the Complainant because no meeting was scheduled and the staff were busy at the time with their school duties.

In regards to the claim that the Academy refused to allow the Complainant to volunteer, OCR found this claim to be untrue. In fact, before the No Contact Order, the Complainant was volunteering every time Student A attended school. And once the No Contact Order was issued, then the Complainant could not volunteer. Additionally, local law enforcement had recommended the No Contact Order because the Complainant engaged in disruptive behavior while volunteering at the Academy; thus, OCR found that the Academy issued the No Contact Order on legitimate reasons and not out of retaliation.

Lastly, OCR found that the Complainant attended all of Student A's planned 504 team meetings. And the Academy amended Student A's 504 Plan to reflect the medication changes whenever they received a notice of medication change from Student A's doctor. Overall, OCR found that the Academy did implement Student A's 504 (same as they found in the first complaint), did respond to the Complainant's request for an evaluation, and not retaliated against the Complainant.

*Booth Law Group represented the school in this matter.

Cases before the Minnesota Department of Education (MDE

Complaint Decision 18-086C (May 29, 2018)

There were three issues of interest in this complaint. First, the parent complained that the District provided initial special education services when she had not given permission. On the Prior Written Notice, the parent did not check either box:

- I agree with the proposal, and I give permission to the school district to proceed
- I do not agree with the entire proposal, and I do not give permission for the school district to proceed.

Instead, the parent underlined the words "I agree with the proposal" and she added a handwritten note "I give permission to the school district to proceed in

providing series". She then attached a list of items in the evaluation and the IEP that she wanted revised. She disagreed with the educational label but she did not disagree with any of the services. The District very clearly explained its thinking in another prior written notice to the parent and advised her that if she wanted to revoke consent services would be terminated. The MDE found that she had provided permission for the services.

The second issue involves the suspension of the student after an evaluation had been requested by the parent. The student was suspended for less than ten school days. Nor was the student suspended for five consecutive days at any time after the evaluation was requested. Thus, the additional protections of a manifestation determination (after 10 school days) and the provision of alternative education (after 5 consecutive school days) were not triggered.

The final issue involved the location of services. Following a long-standing position of the U.S. Department of Education, MDE opined that changing the student's setting III program to another building was not a change in the educational placement and no prior written notice was required.

Complaint Decision 19-004C (September 20, 2018)

In this complaint, the District was found to have provided more speech language services than were outlined on the service grid. The case manager and the speech language clinician provided their notes showing that the services were meant to be at that level but there was an error on the IEP showing only ½ of the services. MDE found the District violated the parents' right to due process when the IEP did not reflect the correct amount of time. Without an accurate notation on the IEP, the parents were unable to object to the services. (The parents' initial complaint was that the speech teacher missed 4 sessions. Missing four twenty minutes sessions would not violate the requirement to provide a FAPE unless it could be shown that the four missed sessions impacted the student's education). The District failed to hold a conciliation conference within 10 days of the parents' objection to the IEP because the one date offered within 10 days did not work for the parents but the District offered other dates outside of the 10-day window.

Complaint Decision 19-005C (October 1, 2018)

The Student had an IEP and a behavior intervention program. During the summer months, the District offered targeted services to all students. The student enrolled in these services two months before they began. The teacher and principal reviewed the student's IEP and behavior plan before she began.

The IEP team, however, never considered what supplemental services or supports she may need to participate. The District staff were confused about whether the program as academic, non-academic, extra-curricular or curricular. MDE noted that none of the behavior interventions or accommodations were implemented during the summer program

Cases before the Office of Administrative Hearings on behalf of MDE

Office of Admin. Hearing No. 5-1300-35369 ISD No. 309 v. Parents (August 8, 2018)

The School District sought an administrative hearing when parents refused initial special education services. The District argued that Minnesota law prohibits a hearing to override a parent's refusal of an initial evaluation, it does not specifically mention that a district cannot override the denial of initial services. But federal law does prohibit such an override and the administrative law judge dismissed the case