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**ARE YOU SURE YOU WANT TO KNOW WHAT'S AROUND THAT CORNER?
EMERGING ISSUES IN SPECIAL EDUCATION**

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Presented by

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I. INTRODUCTION

This presentation will review emerging issues in special education and, where appropriate, will provide strategies for responding to those issues. Examples of issues that will be covered include the MDE's increased level of rulemaking; demands for assistive technology, interpreters, and paraprofessionals on site at nonpublic schools; school choice issues that arise when students seek to change school districts because of mask mandates, the availability of in-person instruction, or the availability of online instruction; demands to modify or destroy special education records of transgender students; demands for IEEs and recommendations for responding; and the application of *Centennial* to school age care settings in the midst of a pandemic.

NOTE: These materials and the corresponding presentation are meant to inform you of interesting and important legal developments. While current as of the date of presentation, the information that is provided may be superseded by court decisions, legislative amendments, rule changes, and opinions issued by bodies interpreting the area of law. We cannot render legal advice without an awareness and analysis of the facts of a particular situation. If you have questions about the application of concepts addressed in this outline or discussed in the presentation, you should consult with your legal counsel. ©2021 Rupp, Anderson, Squires & Waldspurger, P.A.

II. IMPERMISSIBLE RULEMAKING

- A. The MDE Must Follow the APA When Adopting Rules.** An administrative “rule” is any “agency statement of general applicability and future effect . . . adopted to implement or make specific the law enforced or administered by that agency or to govern its organization or procedure.” Minn. Stat. § 14.02, subd. 4. “An agency interpretation that makes specific the law enforced or administered by the agency is an interpretive rule that is valid only if promulgated in accordance with the Minnesota Administrative Procedure Act” (APA). *Application of Q Petroleum*, 498 N.W.2d 772, 780 (Minn. App. 1993). Agency rules created outside of the APA’s procedures are invalid. *Id.*
- B. The MDE’s Emergency Authority Has Expired.** During the height of the pandemic, Governor Walz issued a series of emergency executive orders which stated that school districts and charter schools “must comply” with applicable guidance from the MDE. These emergency executive orders arguably empowered the MDE to create new laws by issuing legally binding guidance without going through the formal administrative rule-making process. That authority has now expired.
- C. How Does the MDE Engage in Impermissible Rulemaking?** The MDE engages in impermissible rulemaking by making decisions and issuing guidance that exceeds existing laws and effectively creates new law. The MDE does this by issuing written interpretations of the law and by issuing complaint decisions that reflect MDE’s views rather than the language of existing statutes and rules. For example:
1. **Special Education Recovery Services and Supports.** Effective July 1, 2021, the Minnesota Legislature passed a new law requiring school districts to convene an “IEP team” meeting and identify supports and services for students with IEPs who, because of the COVID-19 pandemic, demonstrated a lack of progress on “IEP” goals and objectives, demonstrated a lack of progress in the general education curriculum, or demonstrated a loss of learning or skills.
 - a. **MDE interpretation.** In a recent Q&A, the MDE addressed whether this legislation requires school districts to invite parents of infants and toddlers with disabilities who are receiving early intervention services to IFSP team meetings to determine the impact of any disruption resulting from the COVID-19 pandemic on progress towards the outcomes identified in the IFSP. The MDE provided the following response: “Yes. By December 1, 2021, school districts must invite families to meet and discuss the impact of the COVID-19 pandemic on the provision of FAPE to infants and toddlers.” The MDE then provides a list of considerations for IFSP team.
 - b. **Plain language of legislation.** The plain language of the new law does not support the MDE’s interpretation. The new law makes no reference

to infants and toddlers or to an IFSP team. It plainly speaks only to IEP teams and students on IEPs. The actual text of the legislation appears below:

Section 1. SPECIAL EDUCATION RECOVERY SERVICES AND SUPPORTS.

Subdivision 1. **Special education recovery.** The commissioner of education, school districts, and charter schools must collaborate with families of students with disabilities as provided in this section to address the impact of disruptions to in-person instruction on students' access to a free appropriate public education related to the COVID-19 pandemic.

Subd. 2. Special education services and supports.

(a) A school district or charter school that serves one or more students with disabilities must invite the parents of a student with a disability to a meeting of each individualized education program (IEP) team as soon as practicable but no later than December 1, 2021, to determine whether special education services and supports are necessary to address lack of progress on IEP goals or in the general education curriculum or loss of learning or skills due to disruptions related to the COVID-19 pandemic. The services and supports may include but are not limited to extended school year services, additional IEP services, compensatory services, or other appropriate services. This meeting may occur in an annual or other regularly scheduled IEP meeting. If the IEP team determines that the services and supports are necessary, the team shall determine what services and supports are appropriate for the student and when and how those services should be provided, in accordance with relevant guidance from the Minnesota Department of Education and the United States Department of Education. The services and supports must be included in the IEP of the student. A district or charter school must report to the commissioner, in the form and manner determined by the commissioner, the services and supports provided to students with disabilities under this section, including the cost of providing the services.

(b) In determining whether a student is eligible for services and supports described in paragraph (a), and what services and supports are appropriate for the student, the IEP team must consider, in conjunction with any other considerations advised by guidance from the Minnesota Department of Education or the United States Department of Education:

- (1) services and supports provided to the student before the disruptions to in-person instruction related to the COVID-19 pandemic;
- (2) the ability of the student to access services and supports;
- (3) the student's progress toward IEP goals, including the goals in the IEP in effect before disruptions to in-person instruction

related to the COVID-19 pandemic, and progress in the general education curriculum;

(4) the student's regression or lost skills resulting from disruptions to instruction;

(5) other significant influences on the student's ability to participate in and benefit from instruction related to the COVID-19 pandemic, including family loss, changed family circumstances, other trauma, and illness; and

(6) the types of services and supports that would benefit the student and improve the student's ability to benefit from school, including academic supports, behavioral supports, mental health supports, related services, and other services and supports.

(c) When considering how and when the services and supports described in paragraph (a) should be provided, the IEP team must take into account the timing and delivery method most appropriate for the student, such as time of day, day of the week, or time of year, and the availability of other services accessible to the student to address learning loss. The IEP team may determine that providers in addition to school district or charter school staff are most appropriate to provide the services and supports described in paragraph (a).

(d) A school district or charter school must make available the services and supports included in an IEP, as described in paragraph (a), until the IEP team determines that services and supports are no longer necessary to address lack of progress on IEP goals or in the general education curriculum or loss of learning or skills due to disruptions related to the COVID-19 pandemic.

(e) A school district providing special education services on a shared time basis to a student enrolled in a nonpublic school must offer the student special education services and supports in accordance with this section.

(f) The commissioner may identify school district, charter school, and cooperative unit pandemic-related expenses incurred under this section, and if the commissioner determines the costs are eligible for funding using the additional funds set aside under the American Rescue Plan Act, section 2014, for the Individuals with Disabilities Education Act, the commissioner may allocate the federal funds for 100 percent of the costs of the services provided under this section and exclude these expenses from state special education aid under Minnesota Statutes, sections 125A.76 and 125A.79.

2. **Provision Special Education on Site at Nonpublic Schools.** Through a recent complaint decision, the MDE is seeking to dramatically expand the rights of nonpublic school students. As discussed in greater detail below, the MDE has

required a school district to issue a training memorandum to its staff stating that the District is required to:

- a. Provide FAPE to all nonpublic students, regardless of whether they receive District services on a shared-time basis;
- b. Provide FAPE to all nonpublic students attending school in the District, regardless of whether or not they are District residents; and
- c. Provide FAPE to students on site at their non-public school, despite statutory language giving school districts the discretion and authority to determine where FAPE will be provided.

III. THE EXPANDING OBLIGATION TO PROVIDE FAPE TO STUDENTS WHO RESIDE IN THE DISTRICT, ATTEND A NONPUBLIC SCHOOL, AND RECEIVE SERVICES ON A SHARED TIME BASIS

A. Applicable Statutes and Cases

1. Minnesota Statutes Section 125A.18:

No resident of a district who is eligible for special instruction and services under this section may be denied instruction and service on a shared time basis consistent with section 126C.19, subdivision 4, because of attending a nonpublic school defined in section 123B.41, subdivision 9.

If a resident pupil with a disability attends a nonpublic school located within the district of residence, the district must provide necessary transportation for that pupil within the district between the nonpublic school and the educational facility where special instruction and services are provided on a shared time basis.

If a resident pupil with a disability attends a nonpublic school located in another district and if no agreement exists under section 126C.19, subdivision 1 or 2, for providing special instruction and services on a shared time basis to that pupil by the district of attendance and where the special instruction and services are provided within the district of residence, the district of residence must provide necessary transportation for that pupil between the boundary of the district of residence and the educational facility.

The district of residence may provide necessary transportation for that pupil between its boundary and the nonpublic school

attended, but the nonpublic school must pay the cost of transportation provided outside the district boundary.

2. **Minnesota Statutes Section 126C.19:**

For those children with a disability . . . who attend nonpublic school at their parent’s choice, a school district *may* provide special instruction and services at the nonpublic school building, a public school, or at a neutral site other than a nonpublic school *The school district shall determine the location at which to provide services on a student-by-student basis, consistent with federal law.*

3. ***Special School District No. 1 v. R.M.M.*, 861 F.3d 769 (8th Cir. 2017).** This case directly addressed a school district’s obligation to provide special education services to students attending nonpublic schools. *Id.* at 777.

a. In *R.M.M.*, the Eighth Circuit Court of Appeals described a school district’s obligation as follows:

Section 125A.18 requires school districts to provide a FAPE *on a shared time basis* to disabled children attending private school. The statute does not require public school districts to constantly monitor the education offered at private schools. Instead, the district must provide the appropriate services for part of the regular school day while Student attends the private school for the rest of the day.

b. The *R.M.M.* decision establishes that school districts are required to “provide the appropriate services for part of the regular school day” when students receive shared-time services from a public school. *Id.* It further establishes that school districts are not required to provide services “while Student attends the private school for the rest of the day” and are not required to “monitor the education offered at private schools.” *Id.*

B. MDE Complaint Decision No. 21-031C, South Washington County Schools (Dec. 29, 2020) (on appeal to Minn. Ct. App.)

1. **Central Issue.** The central issue in this case is whether a public school district is required to provide special education and related services to nonpublic school students while they are on-site at a nonpublic school.

2. **Facts.** Student and his parent reside within the geographic boundaries of Independent School District No. 833 and attends a nonpublic school. Student is a child with a disability who has an IEP and receives special education services,

including DHH services, on a shared time basis at one of the District's middle schools. For several years, Student's teachers (without the knowledge of any central administrators) allowed Student to use a District-owned FM system at Student's private school. The District determined that it was not legally obligated to provide the FM system at the private school and eventually modified Student's IEP to provide the FM system at the public school site, but not at the private school site.

2. **MDE's Conclusions.** The MDE concluded that the District violated Minnesota law by not providing the FM system on site at the private school. The MDE also concluded that the District denied the Parent a meaningful opportunity to participate in the IEP team process because the District determined it was not legally obligated to provide the FM system at the private school and, thus, predetermined (before the IEP team meeting) that it would not provide the FM system, regardless of whether he needs the FM system to access his education at the nonpublic school. In reaching its conclusion that the District is obligated to provide AT on site at a nonpublic school, the MDE relied on federal guidance interpreting Title II, which clearly applies only to public school programs.
3. **Corrective Action.** The District acknowledged that it had made some procedural errors. Specifically, the District did not clearly address the removal of the FM system from the private school in a PWN and did not consider whether the student needed assistive technology ("AT") in the home setting. To address these errors, the District proposed issuing a memorandum to special education staff explaining the law related to nonpublic school students. The MDE ordered the District to revise the proposed memorandum, to convene an IEP team meeting to determine whether the Student required any compensatory education, and to revise the IEP to continue to provide the FM system at the nonpublic school site. The MDE also made revisions to the District's training memorandum, including statements that contradicted established law. The MDE's version of the memorandum states that the District is required to:
 - a. Provide FAPE to all nonpublic students, regardless of whether they receive District services on a shared-time basis;
 - b. Provide FAPE to all nonpublic students attending a nonpublic school in the District, regardless of whether or not they are District residents; and
 - c. Provide special education (including AT) to students on site at the nonpublic school if they need special education services on site to receive FAPE while attending the nonpublic school.
4. **Appeal to Minnesota Court of Appeals.** The District raised many issues on appeal. For example:

- a. Whether Minnesota law requires a public school district to provide special education and related services to nonpublic school students while they are on-site at a nonpublic school, despite the statute allowing the public district to select the location of services.
 - b. Whether the MDE's decision reflects impermissible rulemaking.
 - c. Whether the MDE has jurisdiction to enforce Title II of the ADA in a special education complaint process established by IDEA and, if so, whether the MDE's interpretation that Title II requires a district to provide an FM system at a nonpublic school is incorrect.
 - d. Whether the MDE can issue an "unfunded mandate" that districts provide equipment at nonpublic schools without allocating funding to districts for that purpose or agreeing to pay the excess costs.
5. **Briefing and Oral Argument.** In its brief to the Court of Appeals, the MDE doubled down and asserted: "if due to the nature of the disability and service – the only way to provide the services is physically onsite, the District must provide the services on site at the nonpublic school under state law." The Court of Appeals repeatedly asked the MDE's attorney to identify the Minnesota statute that says this. The Court of Appeals did not appear to accept the MDE's interpretation. Two judges on the Court of Appeals panel also noted that the MDE's changes to the corrective action training memorandum did not accurately reflect Minnesota law. The MDE's attorney asserted that the MDE's changes to the training memorandum were quoted from Minnesota statutes. When the Court of Appeals asked the MDE's attorney to identify which statute, the MDE's attorney was unable to do so.
6. **Implications.** If the Court of Appeals concludes that Minnesota law requires public school districts to provide special education and related services to nonpublic school students while they are on-site at a nonpublic school, school districts will be responsible for implementing IEPs on site at nonpublic schools and, thus, will be responsible for monitoring and providing for the education of nonpublic school students while they are on-site at the nonpublic school. This would include private schools and homeschools.
- a. This case has astronomical implications for public school districts, including staffing implications, financial implications, and implications regarding the responsibility for students while they are physically on site at a nonpublic school.
 - b. This case is not limited to assistive technology. The MDE's position is that if a student needs a service to receive FAPE *while at the nonpublic school*, the District must provide the service *at the nonpublic school*.

- c. Based on the MDE’s interpretation, if a student needs services – such as a 1:1 paraprofessional, 1:1 nursing services, behavior support, speech and language services, adaptive physical education services, any form of assistive technology, toileting services, mobility services, or interpreter services – the public school district must provide the services or AT during the entire school day at the nonpublic school site, including private religious schools and homeschools. (On page 25 of its brief to the Court of Appeals the MDE acknowledged that its decision would require school districts to provide a sign language interpreter on site at a nonpublic school.)
 - d. If the MDE’s decision remains intact, school districts will also arguably be required to provide services and supports at extracurricular and nonacademic activities that are provided by nonpublic schools.
 - e. The MDE’s decision indicates that the District is required to provide services at a nonpublic school so the Student can receive FAPE. If that is true, and FAPE means “free” appropriate public education – meaning at no cost to the family – then the next logical conclusion would be for the MDE or a family to assert that public schools must pay for students to attend private schools; otherwise, it is not “free” to the family.
7. **Seek Legislative Action.** At one time, the Minnesota Legislature passed a law stating that Minnesota’s special education laws must not exceed federal law. This simple language would avoid the avalanche of unfunded mandates that will befall school districts if they are obligated to provide FAPE on site at nonpublic schools.

IV. SCHOOL CHOICE ISSUES

A. Enrollment Options Act

1. **Application Process and Deadlines.** As a general rule, the Enrollment Options Act states that the parent or guardian of a pupil must submit a signed application by January 15 for initial enrollment beginning the following school year. But the Act makes an exception for students transferring into or out of a district that has an achievement and integration plan. Students who are transferring into or out of a district that has an achievement and integration plan may submit an open enrollment application “at any time for enrollment beginning at any time.” Minn. Stat. § 124D.03, subd. 4.
2. **Establishing Limits on Enrollment.** The Enrollment Options Act states that a school board may, by resolution, limit the enrollment of nonresident pupils in its schools or programs according to this section to a number not less than the lesser of:

- a. one percent of the total enrollment *at each grade level* in the district; or
 - b. the number of district residents at that grade level enrolled in a nonresident district according to this section.
 - c. “The school board may not reject applications for enrollment in a particular grade level if the nonresident enrollment at that grade level does not exceed the limit set by the board,” as described above. Minn. Stat. § 124D.03, subd. 6.
3. **Standards for Accepting and Rejecting Applications.** The Enrollment Options Act states that a school board “must adopt, by resolution, specific standards for acceptance and rejection of applications.”
- a. **Permissible Standards.** “Standards may include the capacity of a program, *excluding special education services*; class; or school building.” (Emphasis added.)
 - b. **Prohibited Standards.** “Standards may not include previous academic achievement, athletic or other extracurricular ability, *disabling conditions*, proficiency in the English language, previous disciplinary proceedings, or the student’s district of residence” (Emphasis added.)
 - (1) In regard to previous disciplinary proceedings, the Act makes an exception for specific offenses.
 - (2) A district may refuse to allow a pupil who is expelled under the Pupil Fair Dismissal Act to enroll during the term of the expulsion if the student was expelled for:
 - i. possessing a dangerous weapon at school or a school function;
 - ii. possessing or using an illegal drug at school or a school function;
 - iii. selling or soliciting the sale of a controlled substance while at school or a school function; or
 - iv. committing a third-degree assault.
4. **Timeline for School District Decisions.** A nonresident district must notify the parent or guardian in writing “by February 15 *or within 90 days* for applications submitted after January 15 in the case of

achievement and integration district transfers whether the application has been accepted or rejected.” (Emphasis added.)

- a. School districts must apply the 90-day timeline in a consistent, nondiscriminatory manner.
 - b. If an application is rejected, the district must state in the notification the reason for rejection.
5. **Timeline for Parent Decision.** The parent or guardian must notify the nonresident district by March 1 or within 45 days [after the application has been accepted] whether the pupil intends to enroll in the nonresident district.
6. **Return to Resident District.** The Enrollment Options Act places limits on a student’s ability to return to the resident district, unless the resident or nonresident district has an achievement and integration plan.
- a. “Notice of intent to enroll in the nonresident district obligates the pupil to attend the nonresident district during the following school year, unless the boards of the resident and the nonresident districts agree in writing to allow the pupil to transfer back to the resident district.” Minn. Stat. § 124D.03, subd. 5.
 - b. “A pupil enrolled in a nonresident district under an achievement and integration plan . . . may transfer to the resident district at any time.” Minn. Stat. § 124D.03, subd. 4.

B. Hypothetical Scenarios

1. **Scenario #1.** Bob is a high school student who resides in District-A. Bob has severe behavioral needs and receives special education and related services under the category of EBD. He normally has a setting III placement in District-A and requires a 1:1 paraprofessional throughout his day. For several parts of his day, the staff to student ratio is 2:1. Two weeks ago, Bob inflicted “serious bodily injury” on another student and staff member at school that caused permanent disfigurement. Because the behavior was a manifestation of his disability, District-A imposed a 45-day unilateral change of placement that involved the delivery of services online. Bob’s parents object to the online services, but rather than fight with District-A, they decide to enroll Bob in the neighboring school district, District-B, which has an achievement and integration plan. They submit an open enrollment application on October 28 and assert that District-B must accept Bob and must begin providing services to him immediately. District-B does not have adequate staff in place to serve Bob.

a. Does District-B have 90 days to notify Bob’s parents whether it is going to accept the open enrollment application?

b. May District-B delay or reject Bob’s open enrollment application if it needs to hire a paraprofessional and teacher to work with Bob but it is unable to do so?

c. If District-B accepts Bob, may it continue to implement the 45-day unilateral change of placement or must it immediately return Bob to a Setting III placement? Does stay-put apply in this situation?

d. If District-B accepts Bob, should the IEP team in District-B meet to determine whether the 45-day interim alternative educational setting is appropriate?

2. **Scenario #2.** Onna is a middle school student who resides in District-A and attends school in District-A. She has a number of health conditions and receives special education and related services under the category of OHD. Onna’s parents are frustrated because District-A recommends but does not require face coverings. Her parents decide to apply for open enrollment in District-B because District-B requires face coverings. Onna’s parents share their idea with other parents. A week later, District-A has a major outbreak of COVID-19 at the middle school and decides to move to distance learning for 35 school days. Approximately 50 students from District-A then submit open enrollment applications to attend District-B. They are upfront about their intent to have their children return to District-A as soon as in-person instruction resumes there.

a. Can District-B deny any of the open enrollment applications?

b. What steps can District-B take to prevent this situation from arising?

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- c. Assuming District-B cannot deny the open enrollment applications, what can it do to prevent the sudden influx and outflow of students?
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3. **Scenario #3.** Javier is a high school student who resides in District-A and meets the eligibility criteria for special education under the category of EBD. For many years, Javier received special education and related services in a Setting III placement in District-A because he has highly aggressive, physical, and unpredictable behaviors. A few months ago, he enrolled at a charter school that provides online learning. The IEP team at the charter school changed Javier's IEP to state that he will be in a Setting I placement and will receive all special education and related services online. A couple months later, Javier's parents become dissatisfied with the online services and apply for open enrollment in District-B, which is an achievement and integration district. Javier's parents assert that District-B must implement the last agreed upon IEP, which provides for a setting I placement.

a. In a recent Q&A, MDE provided the following guidance: "If a student with a disability open enrolls in another school district or enrolls in a charter school to attend a full-time online learning program, that school district or charter school is responsible for providing the student a FAPE consistent with the student's IEP." *See* MDE Frequently Asked Questions: Online Learning and Students with Disabilities, Answer 9 (October 2021).

b. In the same Q&A, the MDE distinguished between a school district's "method of delivery" and the "instructional setting." The MDE went on to state that "virtual Services" is a description of the "method of delivery," not of the instructional setting. The MDE added that the service delivery approach may include in-person, virtual, or a hybrid of in-person and virtual instruction.

(1) Does this mean that virtual instruction is a "service delivery" and not a placement?

(2) Minnesota Rule 3525.0210 states that a significant change of placement occurs if:

i. "there is a change in the type of site or setting in which the pupil receives special education;"

- ii. “the amount of time a pupil spends with nondisabled peers is changed;
- iii. “the amount of special education to accomplish the goals or objectives needs to be increased or decreased.”

c. If District-B is not an online provider and does not offer online educational services to students, how should District-B implement Javier’s IEP?

(1) What steps should District-B take?

(2) Is District-B required to initially provide a Setting I placement for Javier?

d. If District-B is an online provider, what additional option is available to District-B?

4. **Scenario #4.** Brittney a middle school student who resides in District-A and meets the eligibility criteria for special education under the category of ASD. For many years, Brittney has received special education and related services in a Setting III placement in District A because she requires constant verbal redirection and has aggressive, unpredictable behaviors. Brittney becomes easily frustrated with technology and recently threw an iPad at a classmate, resulting in the classmate needing to get stitches. Data from distance learning show that Brittney receives no meaningful educational benefit from online instruction. Brittney’s parents open enroll her at District-B and request that District-B provide all instruction to Brittney virtually, including special education instruction. District-B is an online provider and generally makes virtual instruction available to all students.

a. Is District-B required to make virtual instruction available to Brittney?

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- b. In a recent Q&A, MDE addressed whether a school district is obligated to provide special education and related services through virtual instruction upon a parent/guardian's request. Citing guidance from OSERS, the MDE stated:

It will depend on whether virtual instruction, in-person attendance, or a hybrid approach are available to all students. . . . If virtual instruction is available to all students in [a school district or charter school], the [school district or charter school] must ensure that a child with a disability *whose needs can be met through virtual learning* has an IEP implemented that provides all the services and supports necessary for the child to receive FAPE through such service delivery.

See MDE Frequently Asked Questions: Online Learning and Students with Disabilities, Answer 11 (October 2021) (emphasis added).

- c. The MDE has also stated that the determination to provide virtual instruction must (1) be an individualized determination; (2) be based on family priorities or the needs of the child; and (3) support progress on IFSP outcomes, or annual IEP goals. "The school district is required to include the method of delivery as part of an IFSP or IEP that is reasonably calculated to enable the child to make progress appropriate in light of the child's circumstances."
- d. However, in the same Q&A, the MDE stated:

Question 7: Can a school district or charter school decline a student's access to the school district's or charter school's online learning program because of a student's disability?

Answer 7: No. The same nondiscrimination principles under Section 504 of the Rehabilitation Act of 1973, Title II of the Americans with Disabilities Act of 1990, and the Minnesota Human Rights Act—which prohibit discrimination on the basis of disability—apply to all school district and charter school online learning options. It remains the student's individualized education program (IEP) team's responsibility to determine the necessary special education and related services the student needs for FAPE.

See MDE Frequently Asked Questions: Online Learning and Students with Disabilities, Answer 7 (October 2021).

V. MODIFYING SPECIAL EDUCATION RECORDS FOR TRANSGENDER STUDENTS

A. Rights of Transgender Students

1. **Educational Environment Free of Discrimination and Harassment.** Transgender students have a right to an educational environment that is conducive to learning and is free of harassment and discrimination.
2. **Names and Pronouns.** Transgender students have the right to be addressed by a preferred name and pronouns that align with their gender identity.
3. **Bathrooms.** All students may use bathrooms consistent with their gender identity. All students have the option of using gender-neutral or single-stall facilities, if they choose to do so. No student may be singled out and required by the District to use a gender-neutral bathroom.
4. **Locker Rooms.** All students may use locker rooms consistent with their gender identity. No student may be singled out and required by the District to use a private changing space.
5. **Bullying and Harassment.** The District must not tolerate bullying of students or staff on the basis of sexual orientation, gender identity, or gender expression. The law prohibits discrimination, including harassment, on the basis of sexual orientation, gender identity, or gender expression.
6. **Extracurricular Activities.** Transgender and gender-nonconforming youth may play on sports teams consistent with their gender identity. Subject to meeting the performance criteria that apply to all students trying out for a team, gender non-conforming youth may choose which team they are most comfortable with. For high school students, the District must abide by the rules for transgender participation adopted by the Minnesota State High School League.

B. Common Questions

1. **What should the school do when it receives actual notice of a student's transgender status?** Teachers and other staff should seek guidance from building administration. In most cases, it will be helpful to have the guidance counselor or another appropriate person designated by administration discuss with the student issues that will arise in school. These issues include who will be made aware of the student's transgender status, the student's preferred name and pronouns, options for using restrooms and other facilities, the involvement

of the student's parent/guardian in issues related to the student's transition, and similar issues.

2. **Should a school require “documentation” or “proof” that a student is transgender?** No. A student does not need to provide any type of specific documentation to establish transgender status. The Minnesota Court of Appeals has noted that being “transgender” implicates a range of physical manifestations, which may be social, pharmacological, or surgical in nature. Social transitioning involves no physical changes to the body. A student who socially identifies as transgender is protected under the law. In many cases, a student will not have documentation or other “proof” of transgender status.
3. **When, if ever, does a school district have an obligation to inform parents that their child is transgender?** This is a complicated issue and has been subject to litigation. For example, Maryland's largest school district is currently involved in a lawsuit over guidelines directing staff members not to disclose to parent which gender a student chooses to identify as at school unless the student approves. School districts generally may not withhold information about a child from the child's parents. If a student's transgender status is documented in the student's educational records, a parent or guardian will generally have the right to view those records until the student turns eighteen. Note that the right to view education records is triggered by a parent or guardian request. Whether a school district has an affirmative obligation to disclose information will hinge primarily on the age of the student.
4. **When, if ever, should a student's transgender status be disclosed to staff members?** A student's status as transgender is private data and therefore cannot be disclosed to school staff members except those who have a legitimate educational interest in the information or need to know the information to do their jobs. See 34 C.F.R. § 99.31(a)(1); Minn. R. 1205.0400, subp. 2.
5. **May school staff disclose a student's transgender status to the parent of another student?** No. A student's gender identity is private data, as with other types of protected educational information. Disclosing a student's gender identity to the parents/guardians of other students would be a violation of state and federal law, and would most likely be grounds for disciplinary action against the employee who makes the disclosure.
6. **Do staff have to accommodate transgender students if they do not agree with it for religious or other personal reasons?** Yes. When staff are acting in their capacity as District employees, they must comply with the procedures outlined in the supplement even if they do not personally agree with them. Staff who fail to follow the procedures or who do not cooperate with the implementation of the procedures will be subject to disciplinary action, up to and including immediate discharge.

C. Educational Records

1. **General Rule.** School districts should use a transgender student's preferred name and gender in most school records, particularly if use of the student's legal name and gender may inadvertently reveal that a student is transgender. This would include Skyward, Infinite Campus, school IDs, yearbooks, and programs for sports, plays, and concerts. (NOTE: This will depend, in part, on the age of the student and whether the parent agrees or disagrees for younger students.)
2. **MARSS Reports.** A student's legal name and gender (biological sex) should be used on official documents that clearly require the use of a legal name or gender. *See, e.g.,* 34 C.F.R. 99.20. For example, a student's information must be properly recorded within MARSS. The current MARSS Manual language states that student names must be reported as the student's full legal name. Thus, school districts should use a student's legal name/gender for official records requiring the use of a legal name/gender until a student provides documentation of a legal change.
3. **Special Education Records.** School districts should honor a parent's request to use a student's preferred name and pronouns in an IEP, evaluation report, and other special education records. Using a student's legal name and biological gender will rarely, if ever, be necessary in special education records.

D. Modifying Educational Records

1. **Guidance from OCR.** The U.S. Department of Education, Office for Civil Rights, has provided the following guidance to school districts that receive a request to modify a student's educational records to make them consistent with the student's gender identity:

A school may receive requests to correct a student's education records to make them consistent with the student's gender identity. Updating a transgender student's education records to reflect the student's gender identity and new name will help protect privacy and ensure personnel consistently use appropriate names and pronouns.

Under FERPA, a school must consider the request of an eligible student or parent to amend information in the student's education records that is inaccurate, misleading, or in violation of the student's privacy rights. If the school does not amend the record, it must inform the requestor of its decision and of the right to a hearing. If, after the hearing, the school does not amend the record, it must inform the requestor of the right to insert a statement in the record with the requestor's comments on the contested information, a statement that the requestor disagrees with the

hearing decision, or both. That statement must be disclosed whenever the record to which the statement relates is disclosed.

Under Title IX, a school must respond to a request to amend information related to a student's transgender status consistent with its general practices for amending other students' records. If a student or parent complains about the school's handling of such a request, the school must promptly and equitably resolve the complaint under the school's Title IX grievance procedures.

2. **Summary.** OCR's guidance indicates that school districts should follow the FERPA process for amending or correcting education records "to reflect the student's gender identity and new name" and, thereby, not violate the student's privacy rights. So, the course of action that is least likely to result in litigation is to amend the records or, at a minimum, redact the former "incorrect" name and pronouns that appear on a student's education records.

E. Responding to Requests to "Destroy" Special Education Records

1. **GEPA.** The General Education Provision Act (GEPA) is a federal law that requires public school districts to maintain certain records that are necessary to demonstrate compliance with federal law and are related to the use of federal funds. This requirement applies to special education records, including evaluation reports, IEPs, and prior written notices
2. **IDEA.** The Individuals and Disabilities Education Act's (IDEA) regulations require school districts to inform parents when personally identifiable information that is collected, maintained, or used pursuant to the IDEA is no longer needed to provide educational services to the child. *See* 34 C.F.R. § 300.573. Upon request, such records must be "destroyed . . . if they are no longer needed for education purposes."
 - a. Under federal law, destruction means the physical removal of personal identifiers from information so that the information is no longer personally identifiable.
 - b. As a result, a school district does not need to physically eliminate a child's records to comply with a parent request to destroy records. Instead, the district can simply remove personally identifiable information from the child's records.
3. **Sample Parent Response:**

You have asked the District to destroy the special education records that it maintains on your child. The General Education Provision Act (GEPA) is a federal law that requires public school

districts to maintain certain records that are necessary to demonstrate compliance with federal law and are related to the use of federal funds. This requirement applies to special education records, including evaluation reports, IEPs, and prior written notices. Based on GEPA, the District may not physically destroy any evaluation reports, IEPs, or prior written notices related to your child.

However, under federal law, destruction means the physical removal of personal identifiers from information so that the information is no longer personally identifiable. As a result, the District does not need to physically destroy your child's records to comply with your request. Instead, the District will remove personally identifiable information from your child's records and will maintain the records with a code that the District can use to connect the records to your child in the event the District is required to submit the records to establish proof of compliance with federal law.

VI. RESPONDING TO PARENT REQUESTS FOR AN INDEPENDENT EDUCATIONAL EVALUATION

- A. How must a district respond to a request for an IEE?** Upon receiving a request for an IEE, a district must either provide the IEE at public expense or file for a due process hearing to defend the district's evaluation. 34 C.F.R. § 300.502(b). The district does not have an option to redo or supplement its own evaluation in response to a parental request for an IEE.

- B. What control does a district have over an IEE?** The IDEA regulations state that "the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, must be the same as the criteria that the [district] uses when it initiates an evaluation, to the extent those criteria are consistent with the parent's right to an [IEE]." 34 C.F.R. § 300.502(e)(1).

- C. Who can perform the IEE?** The IDEA regulations require that each school district provide to parents, upon request for an IEE, information about where an IEE may be obtained. Thus, the district's written IEE criteria should include some examples of approved independent evaluators. 34 C.F.R. 300.502(a)(2).
 - 1. Districts may not provide an exhaustive list.** In the past, districts have tried to require parents to select an independent evaluator from a list that the district created. Unless the list is an exhaustive list of all qualified providers in the area, a school district cannot require the parents to choose an evaluator from such a list.

2. **Parent choice.** The MDE has stated that the “right to an IEE belongs to the parents.” *In re: [Student] v. Independent Sch. Dist. No. 621, Mounds View Public Schs.*, MDE File No. 650 (Nov. 8, 2005). Therefore, parents, not school districts, have the ultimate authority to choose an evaluator, as long as the evaluator meets the IEE criteria set by the district (and if unique circumstances exist, the district may have to agree to modify its IEE criteria).
3. **Mileage limitations.** The Office of Special Education Programs (“OSEP”) of the U.S. Department of Education has opined, however, that districts may impose limitations on the number of miles an evaluation can be conducted away from the district, as long as this does not prevent the parents from getting an appropriate evaluation. *Letter to Bluhm*, 211 IDELR 227A (OSEP 1980).

D. Must parents sign an evaluation plan for an IEE?

1. The MDE has ruled that a requirement that an evaluation plan will be developed for an IEE and that the parent will need to consent to the plan is inconsistent with IDEA.
2. In *Anoka-Hennepin Independent School District No. 11*, 110 LRP 44938 (MDE July 15, 2010), the MDE reviewed IEE criteria established by a school district, including a requirement that an evaluation plan would be developed by the district working in cooperation with the independent evaluator and the parent and that the parent would be expected to consent to the evaluation plan before the IEE was commenced.
 - a. The MDE found that the precondition that an evaluation plan be developed and consented to prior to completion of the IEE went beyond setting criteria to ensure that the examiner was qualified to conduct the IEE and thus found that the precondition was impermissible.
 - b. The MDE relied on the following provision of IDEA in making its decision: “Except for the criteria described in paragraph (e)(1) of this section [related to setting criteria concerning location and qualifications of examiner], a public agency may not impose conditions or timelines related to obtaining an independent educational evaluation at public expense.” 34 C.F.R. § 300.502(e)(2).

E. Are there any limitations on the cost of an IEE? OSEP has stated that a school district may establish criteria to ensure that the cost of an IEE is reasonable. *Letter to Kirby*, 213 IDELR 233, (OSEP May 4, 1989).

1. **May establish maximum charges.** OSEP noted that in order to avoid unreasonable charges for IEEs, a district may establish maximum allowable charges for specific tests. OSEP stated that if a district does establish maximum allowable charges for specific tests, the maximum cannot simply be an average

of the fees customarily charged in the area by professionals who are qualified to conduct the specific tests. Rather, the maximum must be established so that it allows parents to choose from among the qualified professionals in the area and only eliminates unreasonably excessive fees.

2. **Must allow for exceptions.** When enforcing reasonable cost containment criteria, districts must allow parents the opportunity to demonstrate that unique circumstances justify an IEE that does not fall within the district's criteria. If an IEE that falls outside the district's criteria is justified by the child's unique circumstances, that IEE must be publicly funded.
3. ***In the Matter of Minnetonka Public Schools, Independent School District No. 276, Plaintiff, v. M.L.K., Civil No. 20-1036 (DWF/KMM) (March 1, 2021), appeal filed.***
 - a. In this case, the "independent" examiner testified although his typical cost for an IEE was between \$7,000 and \$10,000, the cost of this particular IEE was \$14,500.
 - b. The independent examiner testified that his costs were higher because he consulted with another examiner. He also admitted that he probably could have done the IEE without the other examiner.
 - c. When asked why the IEE was so much more expensive than his standard charge, the independent examiner cited the "volume of records and the complexity of the case," but he did not say that the record review required more than other cases.
 - d. Based on this testimony, the ALJ held that the Parents failed to establish that the IEE was so complex and atypical that the entire—anomalously large—cost of the IEE should be reimbursed. Therefore, the ALJ ordered the District to reimburse the parents in the amount of \$10,000 for the IEE, representing the upper range of the typical IEE cost, rather than the full \$14,500.
 - e. The Federal District Court of Minnesota affirmed this part of the decision. The Court agreed that the Parents were entitled to reimbursement in the amount of \$10,000 for IEE fees because the district's evaluation was deficient under Minnesota law. The case is now on appeal to the Eighth Circuit Court of Appeals.

F. What other steps can a school district take to protect itself against unexpectedly high IEE costs? School district may enter into a contract with the independent examiners. The contract should contain the following type of language:

1. *IEE.* Evaluator will conduct an IEE that covers the areas of evaluation requested by Parent and meets the District's criteria for an IEE, as stated in Exhibit A.
2. *Classroom Observations.* If Evaluator concludes that classroom or school-based observations are required in order to perform the evaluation services listed in this Agreement, the observations must be scheduled and conducted in a manner that does not create a disruption or unnecessary distraction and complies with all guidelines established by the Minnesota Department of Education and the Minnesota Department of Health. During a classroom observation, Evaluator may not initiate an interaction or discussion with the teacher or any students and may not record data on any pupil other than Student.
3. *Evaluation Report and Underlying Data.* Upon completing the IEE, Evaluator must submit a written evaluation report to Parent and to the District's Director of Special Education. Upon submitting the report, Evaluator must also submit a copy of the following to the District's Director of Special Education: all completed assessment protocols; all completed rating scales; all assessment worksheets; all scoring data, including but not limited to, subtest scores and composite scores; and all other records and data that were gathered, reviewed, recorded, compiled, or generated as a result of the evaluation services, including notes. Parent has the right to access such materials directly from the District.
4. *Purpose of Evaluation.* The purpose of the evaluation is to generate information for the Student's team to consider when identifying the Student's individual educational needs and considering a program of education that is designed to meet those needs. Accordingly, the evaluation must be educational in nature. The evaluation may not include any treatment or medical care, and no physician-patient privilege or similar relationship will be created as a result of the evaluation.
5. *Payment.* The District will pay Evaluator at the rate of _____ dollars and zero cents (\$ __.00) per hour for up to _____ hours of time spent by Evaluator conducting an IEE and producing a written evaluation report. The District will not pay for more than _____ hours of time, unless Evaluator notifies the District's Director of Special Education in advance that Evaluator cannot complete the requested evaluation services within _____ hours and obtains written permission from the Director of Special Education to perform additional hours of service at the rate established in this Agreement.
6. *Mileage.* The District will pay Evaluator at the current IRS mileage rate for mileage that Evaluator drives in order to observe Student at school as part of the IEE or to administer testing instruments to Student.

7. *Invoice.* Within thirty days after Evaluator completes the IEE, Evaluator must submit an invoice to the District's Director of Special Education. The invoice must state the number of hours of evaluation service that were provided, the specific nature of the services that were provided, the dates on which the evaluation services were provided, and the amount of any mileage driven in order to observe Student at school or to administer testing instruments to Student. Evaluator must also submit a completed W-9 form and a copy of any applicable license. The District will pay Evaluator within forty-five (45) calendar days after receiving an invoice for services.
8. *Relationship of the Parties.* Relative to each other, Evaluator and the District are independent contractors for all purposes, including, but not limited to, federal and state taxes. Nothing in this Agreement may be construed to create an employment relationship, a partnership, a joint venture, or a joint enterprise between the District and Evaluator.
9. *Data Practices.* The Minnesota Government Data Practices ("MGDPA") defines "educational data" to include all recorded data that relate to an individual student and are maintained by a school district or a person acting for a school district. Educational data are classified as private data on individuals under the MGDPA. When evaluating Student, Evaluator may access private educational data on Student only if Parent provides written consent for the District to release such data to Evaluator. Evaluator is responsible for obtaining Parent's written consent and providing it to the District.
10. *No Discrimination.* The parties agree to comply with Title VI of the Civil Rights Act, which prohibits discrimination on the basis of race, color, age, sex, national origin, and creed; Section 504 of the Rehabilitation Act and the Americans with Disabilities Act, which prohibit discrimination on the basis of disability; and all other federal and state laws prohibiting unlawful discrimination in a public school setting.
11. *Entire Agreement.* This Agreement constitutes the entire agreement between the parties. Neither District nor Evaluator has relied on any statements, promises, or representations that are not stated in this document. The terms of this Agreement are contractual and supersede any and all prior agreements between the parties and any inconsistent provisions in any publications, including, but not limited to, any District handbooks, policies, or practices. No waiver or modification of any provision of this Agreement will be valid unless it is in writing and signed by both parties.

G. Sample Letter to Parents in Response to IEE Request

[DATE]

[PARENT NAME]
[STREET ADDRESS]
[CITY, MN ZIP]

Dear [PARENT NAME]:

On behalf of Independent School District No. ____, I am writing in response to your request for an Independent Educational Evaluation (IEE) of [STUDENT'S NAME].

RESPONSE TO YOUR REQUEST FOR AN IEE

In response to a request for an IEE, a school district is required to take two steps. First, a school district must provide its criteria for an IEE and information about where parents can obtain an IEE. You will find the District's criteria and sources for obtaining an IEE in the next section of this letter. Second, a school district must either grant the request for an IEE or initiate a special education due process hearing without undue delay. A parent is not entitled an IEE at school district expense if the school district requests a hearing and shows: (1) that the parent does not disagree with the school district's most recent educational evaluation of the student; (2) that the school district's most recent educational evaluation was appropriate; (3) that the school district has not had an opportunity to evaluate the student; or (4) that the IEE does not meet the school district's criteria for an IEE.

The District believes that if it requests a hearing it can show that its evaluation of [STUDENT'S NAME] is appropriate in all respects. However, based on a cost-benefit analysis, the District has decided to grant your request for an IEE. Accordingly, the District will assume financial responsibility for the IEE, provided that it meets the District's criteria.

In granting your request, I want to clarify the District's obligations in the event that you pursue your request for an IEE. If you obtain an IEE, regardless of whether it is at the District's expense or at your own expense, the District would be obligated to consider the results of the IEE. The District would not necessarily be required to accept or adopt the results of the IEE. Similarly, the District would be required to consider any recommendations that an independent evaluator makes, but the District would not necessarily be required to accept or implement the recommendations. For more information about rights and obligations related to an IEE, I encourage you to review the procedural safeguards that are enclosed with this letter.

IEE DEFINITIONS AND CRITERIA

- A. Definition of Independent Educational Evaluation.** An IEE is an “evaluation” conducted by a qualified examiner who is not employed by the District. An “evaluation” refers to procedures that are used to determine whether a student has a disability and the nature and the extent of the special education and related services the student needs. An IEE does not involve the receipt of medical care, treatment, or medical advice, and no physician-patient privilege, psychologist-patient privilege, or similar relationship is created as the result of an IEE.
- B. Examiner Qualifications.** Independent examiners must be qualified to conduct an IEE. To be qualified, independent examiners must be licensed by the Minnesota Department of Education, the Professional Educator Licensing and Standards Board, or by an accredited organization or agency, if any, that represents their profession within their state or nationally. Upon request, the District will give you an opportunity to show that unique circumstances justify the selection of an independent examiner who does not have such qualifications.
- C. Geographic Area.** Independent examiners must be located within 150 miles of the school the child attends. Numerous independent examiners are located within this geographic area, which encompasses several major cities, including, but not limited to, St. Paul and Minneapolis. Upon request, the District will give you an opportunity to show that unique circumstances justify the selection of an independent examiner who does not meet the District’s location criteria.
- D. Evaluation Instruments.** Evaluation instruments must be relevant in determining whether the student has a disability or the nature, the student’s individual educational needs, or the extent of the special education and related services the student needs. In addition, evaluation instruments must be age appropriate and current. To be current, an evaluation instrument must be the most recent version available or must otherwise be recognized by the publisher as being valid at the time it is administered. Evaluation instruments must also be administered, scored, and interpreted in compliance with the publisher’s requirements and guidelines.
- E. Classroom Observations.** An IEE may include observations in an educational setting. Classroom observations must be conducted in a manner that does not create a disruption or unnecessary distraction. For example, an evaluator who is conducting a classroom observation may not initiate an interaction or discussion with any students or with the teacher while instruction is occurring.
- F. Evaluation Data.** Upon completing the IEE, the independent examiner must submit a copy of the following to the District: all completed assessment protocols; all completed rating scales; all assessment worksheets; all scoring data, including, but not limited to, subtest scores and composite scores; and all other

data that have been gathered, reviewed, compiled, or generated as a result of the IEE.

- G. Evaluation Report.** The independent examiner must prepare a written evaluation report that summarizes the evaluation results. In accordance with Minnesota Rule 3525.2710, the report should contain: (1) a summary of all evaluation results, including but not necessarily limited to standard scores, subtest scores, and ratings, if applicable, from assessment instruments that were administered; (2) an interpretation of the assessment results, including documentation of whether the student has a particular category of disability or, in the case of a reevaluation, whether the student continues to have such a disability; (3) the student's present levels of performance and educational needs that derive from the disability; (4) whether the student needs special education and related services or, in the case of a reevaluation, whether the pupil continues to need special education and related services; and (5) whether any additions or modifications to the special education and related services are needed to enable the student to meet the measurable annual goals set out in the student's IEP and to participate, as appropriate, in the general curriculum. The report should also contain dates when evaluation activities were conducted and facts in support of any opinions or recommendations contained in the report.
- H. Costs.** The cost of the IEE must be reasonable. You will be given the opportunity to demonstrate that unique circumstances justify an IEE with costs that would not ordinarily be deemed to be reasonable. The District may initiate a special education due process hearing to challenge any costs that it deems to be unreasonable.

INFORMATION ABOUT WHERE AN IEE MAY BE OBTAINED

The following is a list of independent examiners who may be qualified to conduct an IEE. You may select an evaluator from the enclosed list. Alternatively, you may select an evaluator who does not appear on the enclosed list.

A. Cognitive Testing, Behavioral Assessments, and Functional Behavior Assessments:

1. _____, Licensed School Psychologist, _____ School District
Phone Number: _____ Address: _____
2. _____, _____
Phone Number: _____ Address: _____

B. Academic Testing:

1. _____, Licensed Special Educator, _____ School District
Phone Number: _____ Address: _____

2. _____,
Phone Number: _____ Address: _____

C. Other Testing:

1. _____, _____ Agency
Phone Number: _____ Address: _____

2. _____, _____ Agency
Phone Number: _____ Address: _____

PARENT RESPONSIBILITIES

- A. Selection of Independent Examiner Who Meets Criteria.** You are responsible for selecting an independent examiner(s) who meets the District's criteria. An exception will be made if you can demonstrate that unique circumstances justify the selection of an independent examiner who does not meet the District's criteria. The District may request a hearing to challenge your right to an IEE at public expense if the District concludes that the IEE does not meet the District's criteria.
- B. Selection of Independent Examiner Who is Available.** You are responsible for selecting an independent examiner who is available and able to complete the IEE within a time frame that is acceptable to you. An IEE is not a public school evaluation. The District has no control over whether a particular examiner is available or when an IEE will be completed.
- C. Scheduling the IEE.** You are responsible for scheduling the IEE. At your request, the District will cooperate with you in scheduling the IEE, including any classroom observations.
- D. Planning the IEE.** You are responsible for planning the IEE and determining the areas that the IEE will cover. Although you are not required to consult with the District to determine the scope of the IEE or to develop an evaluation plan for the IEE, the District is generally entitled to evaluate a student in particular areas of concern before it is required to pay for an IEE. The District may request a special education due process hearing and refuse to pay for an IEE that would deprive the District of its right to evaluate in the first instance.
- E. Consent for Review of Records.** The independent examiner may ask to review educational records that are relevant to an educational evaluation. In order for the District to provide any of your child's educational records directly to the independent examiner, you must sign a form authorizing the District to release educational data to the examiner. Upon request, the District will provide you with the necessary form.

- F. Meeting to Consider Results of IEE.** The IEP team will meet to consider the results of the IEE. The team may accept or reject the results of the IEE, as well as any recommendations that are made by the independent examiner.

You may contact my office if you have any questions or concerns about the IEE.

Sincerely,

Director

Enclosure: Procedural Safeguards
c: Student's file (w/ encl.)

VII. THE APPLICATION OF *CENTENNIAL* TO SCHOOL CHILDCARE SETTINGS

- A. The Issues.** What level of accommodations must a school district provide to a special education student who enrolls in the district's school age care program? Does *Centennial* apply? Are there any limitations on a district's obligations? Who pays for the accommodations that are provided?

B. Definitions

1. **"Extracurricular and nonacademic activities"** means all athletic activities, clubs, and other activities that are offered by groups that are sponsored by the school district.
2. **"Supplementary aids and services"** means "aids, services, and other supports that are provided in regular education classes, other education-related settings, and in extracurricular and nonacademic settings, to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate" 34 C.F.R. § 300.42.
3. **"Equal opportunity to participate"** means that the student has equal access to an activity and an equal opportunity to succeed. However, an equal opportunity to participate does not guarantee any opportunities that are not available to non-disabled students (such as access to a gifted program that is based on school performance or to an athletic team that is determined based on try-outs and merit).

- C. *Independent School District No. 12, Centennial v. Minnesota Department of Education*, 788 N.W.2d 907 (Minn. 2010).**

1. **Facts:** The case involved a fifth grade special education student who was diagnosed with ASD and Tourette Syndrome. She struggled with motor, vocal, and facial tics, especially when anxious. As a result of her disabilities, the

student had strong sensory needs and occasionally needed motor breaks. The parents submitted a list of proposed accommodations that they believed would allow the student to participate in extracurricular and nonacademic activities. The proposed accommodations included the following: (1) being allowed to miss practices and games to manage health concerns and stress; (2) receiving adult supervision after the activity until an adult or the activity bus picked her up; and (3) having access to her cell phone during the activity. The parents asked the District to provide these accommodations for volleyball and after-school clubs. They also asked the District to provide similar accommodations at a graduation party that was hosted by the PTO, which is a private group.

2. **Holding:** The Minnesota Supreme Court held that when developing an IEP for a student, the IEP team must identify the “supplementary aids and services,” if any, that are “necessary and appropriate” to afford the student an equal opportunity to participate in “extracurricular and nonacademic activities.” As a result of this case, IEP teams must engage in a **two-step inquiry**, which involves determining: (1) whether a particular “extracurricular or nonacademic activity” is “appropriate” for the student; and (2) whether “supplementary aids and services” are “necessary and appropriate” for the student

D. MDE Complaint Decision File 20-041C, (MDE Dec. 19, 2019)

1. **Facts:** A student who qualified for special education services began attending a school district’s child care program. The environment in the child care program frequently involved greater sensory stimulation from the movement and noise of other students than a typical education setting. This caused the student to become aggressive and to display violent behaviors. The district initially provided informal accommodations to address the student’s needs, but did not revise the student’s IEP to address his participation in the child care program. The district later revised the student’s IEP to include accommodations for the child care program. Ultimately, the district prohibited the student from attending the child care program because the student violated the program’s behavior expectations multiple times even with the significant accommodations that were provided to address his behavior.
2. **Issue:** Do school districts need to include in a student’s IEP the supplementary aids, services, program modifications, or supports needed to enable the student to participate in a district’s school-age childcare program?
3. **Legal Standards:**
 - a. *34 C.F.R. § 300.320(a)(4)(ii):* IEPs must include a statement of the special education and related services that will be provided to enable a child to “to participate in extracurricular and other nonacademic activities.”

refusal or inability to follow safety protocols presents a direct threat of harm to the student and/or others, the district may prohibit the student from attending the school sponsored childcare.