RUPP, ANDERSON, SQUIRES & WALDSPURGER, P.A.

333 South Seventh Street, Suite 2800
Minneapolis, MN 55402
Office (612) 436-4300
Fax (612) 436-4340

www.raswlaw.com

EMERGING LEGAL ISSUES IN SPECIAL EDUCATION

MASE Fall Leadership Conference 2019

Presented By

Amy E. Mace
amy.mace@raswlaw.com

Liz J. Vieira
liz.vieira@raswlaw.com

I. INTRODUCTION

This presentation will review recent special education complaint decisions, due process hearings, and court cases related to students with disabilities. The presentation will review takeaways from these decisions that directors should keep in mind, as well as the process for the Office of Civil Rights and Minnesota Department of Human Rights investigations related to disability discrimination.

II. HEALTH-RELATED CONCERNS

a. *Albuquerque Public Schools v. Sledge*, Civ. No. 18-1029 KK/LF, Civ. No. 18-1041 KK/LF, 2019 WL 3759479 (D. N.M. Aug. 8, 2019)

i. Facts: A student who suffered from a seizure disorder was designated as a qualified patient whose primary caretaker could administer medical cannabis to her under state law. State law prohibited the possession and

use of medical cannabis on school grounds. Prior to the student entering preschool, the parents requested homebound services for the student so that the mother could administer cannabis in the event of a seizure. The district declined the parents' request. Thus, the mother accompanied the student to preschool from 2016 to 2018 with the plan that, if the student had a seizure, the mother would pick her up, carry her off of school grounds, and administer the medical cannabis.

At the student's IEP meeting in the spring of 2018, the parents again requested homebound services for the student's upcoming kindergarten year. The district again denied the request, proposing the student attend all-day kindergarten at her neighborhood elementary school. The parents then requested an administrative due process hearing alleging the district and state department of education denied the student a free and appropriate education. The hearing officer agreed with the parents and ordered the district to provide the student with homebound services and an abbreviated school schedule. The district filed a civil action challenging the hearing officer's decision, and the parents filed a cross-appeal.

ii. **Issues:** Did the district deny the student a FAPE under IDEA? Did the district violate the student's Section 504 rights?

iii. **Holding:** The court held that the district did not deny the student a FAPE during preschool but did deny the student a FAPE when it refused the parents' request for homebound services during kindergarten. While the court noted that IDEA did not require district officials to administer medical cannabis to the student because such administration was unlawful, the district's proposed IEP for kindergarten would have put the student's life or health at unreasonable risk because it did not provide any means for the student to timely obtain potentially life-saving treatment in case of a seizure. With respect to preschool, however, the court determined that the mother made the choice to accompany the student to preschool. The mother's voluntary choice did not negate the free nature of the student's preschool education. For this reason, the district similarly was not obligated to compensate the mother for attending preschool with the student.

On the Section 504 issue, the court concluded that the district's decision not to store or administer the student's cannabis on school grounds was not based on the student's disability. Rather, the district's decision was based on the unlawfulness of such storage and administration. Thus, the parents' Section 504 claim failed.

iv. **Implications**. School districts are not obligated to contravene federal law when implementing IEPs or Section 504 plans. However, this may not completely absolve districts from accommodating parent requests related to medical cannabis.

b. *G.C. v. South Washington County Sch. Dist.*, Civ. No. 17-3680 (DSD/TNL), dismissal as moot at 2019 WL 4600212 (D. Minn. Sept. 23, 2019)

i. **Facts:** Plaintiff was a student who requested a Section 504 plan and accommodations related to an alleged condition called "Electromagnetic Hypersensitivity Syndrome" ("EHS"). The student experienced a variety of non-specific symptoms such as headaches, nosebleeds, and dry skin on his hands. A medical provider in another state where the student had previously attended school diagnosed the student with EHS and attributed those symptoms to exposure to wireless signals. When the student transferred to school in Minnesota, the school offered some accommodations to address the symptoms and the student's anxiety, but the school refused accommodations related to the Wi-Fi system. The student requested five specific accommodations during the lawsuit, including: 1) allowing the student o sit as far away from the Wi-Fi access point in the classroom as possible; 2) allow the student to hook up an Ethernet cable for his computer; 3) allow the student to go to the library and the use the Ethernet cable there if there is a classroom assignment that requires internet use; 4) turn down the Wi-Fi in the student's classrooms; and 5) allow the student to go to the nurse's office when he doesn't feel well. After the student and school district argued the case, but before the Court issued its decision, the student transferred to a different school. The Court ruled that the case was moot because

ii. **Issues:** Does Section 504 require accommodations for conditions with no medical consensus regarding the relationship between the requested accommodations and the student's condition?

iii. **Holding:** Case dismissed as moot because student transferred schools and could no longer receive requested accommodations from the school named in the lawsuit.

iv. **Implications:** This case presented an interesting test regarding the extent to which schools must accept a medical diagnosis on a condition for which there is no consensus. In a case with similar claims in Massachusetts, the court ruled that the Plaintiff's scientific evidence regarding EHS was inadmissible because it did not meet legal standards for scientific reliability. *G. v. Fay School*, 931 F.3d 1 (1st Cir. 2019).

III. TRANSPORTATION

a. *Osseo Area Sch., Indep. Sch. Dist. No. 279 v. M.N.B. by & Through J.B.*, 344 F. Supp. 3d 1040 (D. Minn. 2018)

i. Facts: A student suffering from emotional and behavioral disorders lived open-enrolled in another district. Among other accommodations and services, the student's IEP included reimbursement for transportation costs "individually to and from school."

The district and parents agreed that the student would attend an alternative learning center so that she could receive necessary special education services. The open-enrolling district did not dispute the student's need for individualized transportation, and agreed to reimburse the parents for mileage between the district's boundary and the school. However, the district rejected the parents' request for mileage reimbursement between their home located outside the district's boundaries and the school. After being unable to reach an agreement on mileage reimbursement, the student filed a due process complaint. The student argued that the district failed to meet its obligation to provide a FAPE by refusing to provide transportation services between her home and school because her IEP expressly stated that she required "individualized transportation" to and from school.

The district argued that it had no obligation to provide door-to-door transportation services to the student because she chose to open enroll in the district based purely on parental preference. The district relied heavily on the Eighth Circuit Court of Appeals decisions *Timothy H. v. Cedar Rapids Cmty. Sch. Dist.*, 178 F.3d 968 (8th Cir. 1999) and *Fick ex rel. Fick v. Sioux Falls Sch. Dist. 49-5*, 337 F.3d 968 (8th Cir. 2003), for the proposition that when a transportation request is based on parental preference, a school district is not required to provide transportation beyond its borders:

1. In *Cedar Rapids*, the Eighth Circuit upheld a school district policy allowing students to transfer schools intra-district, but requiring that parents provide the transferring student's transportation between school and home. The parents of a student with an IEP containing a specialized transportation provision transferred their daughter from her neighborhood school to another school within the district. They did not dispute that the neighborhood school offered their daughter a FAPE, but stated that they preferred the special education program offered at the school outside of their

neighborhood. The Eighth Circuit held that the district was not obligated to provide transportation to and from the new school because the decision to transfer was not based on the child's educational needs, which could have been met at the neighborhood school, but rather on parental preference.

2. Likewise, in *Fick*, the parent of a child with an IEP containing a specialized transportation provision requested that her daughter be dropped off at a site outside her neighborhood school boundary, but within the school district. The record established that the request was made for personal rather than educational reasons. Relying on *Cedar Rapids*, the court held that a school district does not violate the law when, in applying a facially neutral transportation policy, it rejects a request for specialized transportation based on parental convenience or preference.

Despite these cases supporting the district's argument, the administrative law judge (ALJ) ruled in the student's favor, concluding that while the student remains open enrolled in the district, the district is responsible for the student's FAPE and implementation of the IEP, including the transportation and mileage reimbursement requirements. The ALJ ordered the district to reimburse the student for all transportation expenses incurred to date and going forward. The district appealed the ALJ's decision.

ii. Issue: Whether the district was required under IDEA to provide "transportation services" beyond its borders to an open-enrolled student?

iii. Holding: Yes. The court noted that in Minnesota, the school district in which the child open enrolls is responsible for ensuring the student receives a FAPE. The court said that the issue ultimately boils down to whether the student's request for transportation services is based on parental preference or the district's obligation to provide a FAPE. The former would mean the district is not responsible for the student's transportation beyond its borders, while the latter would mean it is responsible.

The court agreed with the student that under the circumstances presented, the district was required to provide door-to-door transportation services to the student in order to meet its obligation to provide a FAPE to the student. The student's IEP expressly stated that she required individualized transportation between her home and school because she struggled with other students who were in close proximity to her that

displayed vocalizations. As a result, individualized transportation was a related service necessary to ensure that she received a FAPE. Because the district was responsible for providing the student with a FAPE, it was therefore responsible for providing her with specialized transportation as stated in her IEP. The fact that the parent made the decision to open enroll the student in the district did not undermine this conclusion or alter what the student required in order to receive a FAPE.

The court said the district's reliance on the *Timothy* and *Fick* decisions was misplaced. First, the court noted that the "transportation request" was not based on parental preference, but rather on a specific provision in the student's IEP that was necessary for her to receive a FAPE. Second, the court ruled that *Timothy* and *Fick* are distinguishable. The court noted that the student here is not challenging an intra-district policy based on parental preference; rather, she is challenging the district's decision to disregard an aspect of her IEP that is necessary for her to receive a FAPE at the school the district designated her to attend. The court further explained that this case involves the open enrollment process rather than concurrent school choices – both of which could provide a FAPE – within the same district. The court stated that the choice to open enroll is not the same as choosing one FAPE-providing school over another within a single school district, and that expanding *Timothy* and *Fick* to the open enrollment context would allow school districts to avoid their obligation to provide a FAPE by simply establishing that the decision to open enroll was based on parental preference, which is no doubt often the case, rather than educational need.

iv. **Appeal to Eight Circuit Court of Appeals:** The district appealed this decision to the Eighth Circuit Court of Appeals. The case has not been argued, so it will likely be a while before a decision.

v. **Implications:** For the time being, if an open-enrolled student requires specialized transportation in order to access FAPE, a district should transport the student outside of the district's borders. However, as noted above, this decision was appealed, so the conclusions and implications from this case could change depending on how the Eight Circuit Court of Appeals rules on the issue.

b. *Duluth ISD 0709-01*, MDE Case No. 19-120C, 119 LRP 33231 (Aug. 12, 2019)

i. **Facts:** The student's resident district placed the student in a special education program in another district. The resident district provided

transportation for the student during the school year. The student's IEP team met in April to discuss the student's need for educational programming in the summer. No representatives of the resident district were invited or present for the meeting. The IEP team did not discuss or evaluate the student's eligibility or need for special education transportation to the summer program. The providing district also did not properly revise the IEP to accurately reflect the summer services to be provided, which, as MDE found, fit the definition of extended school year (ESY) services under IDEA and state law.

At the end of May, the resident district informed the providing district it would not transport the student to the summer program because it was not part of the regular school year; i.e., during regular operating hours. The student then filed a complaint with MDE. Following submission of the complaint, the providing district IEP team and a representative of the resident district met and both declined to provide the student special education transportation to the summer program. The providing district notified the student and his parents of this decision. The student attended the summer program but did not receive transportation services from either district.

ii. Issue: Was the student denied FAPE when the providing district failed to consider whether he needed transportation as a related service under IDEA for ESY?

iii. Holding: Yes. MDE concluded that the providing district violated IDEA when it failed to arrange appropriate transportation services for the student. MDE explained that if an IDEA-eligible student needs transportation services to access his educational program and receive FAPE, the providing district must provide transportation services at no cost to the parents. MDE explained that under federal law, the IEP team is responsible for determining whether transportation services are necessary and how they should be implemented. See 34 C.F.R. § 300.34(c)(16); *Letter to Smith*, 23 IDELR 344 (1995).

MDE concluded that the providing district violated IDEA and state law when it determined that the student was not entitled to any transportation services, instead of having the IEP team make an individualized determination regarding the student's need for transportation to the summer program. It noted that the providing district had a duty to assess the student's eligibility for transportation and arrange such services to fit his needs for the program. MDE also concluded that the providing district violated IDEA and state law when the student's IEP team failed to

properly revise the student's IEP to reflect the special education and related services to be provided during the summer, and when it failed to provide a prior written notice describing the agreed upon plan for the provision of FAPE and an attached IEP to the parents.

Moreover, MDE found that the providing district violated IDEA and state law when it failed to invite a resident district representative to the student's April 2019 IEP team meeting or otherwise ensure a resident district representative, responsible for providing an appropriate education program to the student and knowledgeable about the availability of resources, was engaged in discussions regarding the student's transportation and services during the summer of 2019. If the resident district had been invited to the student's IEP team meeting and ensured that an appropriate IEP was developed jointly by both districts, then the resident district would have known that the summer services provided by the providing district met the definition of ESY services and that the student's IEP team believed these services were appropriate for the student. MDE noted that the resident district then would have been responsible for providing the student transportation to the ESY program, but the providing district's errors resulted in neither district providing transportation. As a remedy, MDE instructed the providing district to issue a memo informing special education staff about IDEA requirements and to work with the resident district to ensure the student receives a FAPE.

iv. **Implications:** Districts should be certain to consider transportation and other accommodations necessary for accessing educational services, including during the summer. In particular, districts which have students placed by other districts should be mindful of the obligation to invite representatives of resident districts to meetings and other coordinate to ensure the provision of services.

IV. INDEPENDENT EDUCATIONAL EVALUATIONS

a. *N.D.S. v. Acad. for Sci. & Agric. Charter Sch.*, 18-CV-0711 (PJS/HB), 2018 WL 6201725 (D. Minn. Nov. 28, 2018)

i. **Facts:** In late 2014, the plaintiff student, who received special education services, experienced a number of physical and emotional changes that prompted her parents to request a reevaluation by defendant school. The school agreed and completed the reevaluation in December 2015. The parents were given a copy and did not disagree with the reevaluation in any way. The student then suffered a concussion in June 2017 that

worsened her physical and learning disabilities. Instead of asking for a reevaluation, the student's parents emailed the school in October 2017, informing it that the December 2015 reevaluation had been inadequate and requesting an independent educational evaluation ("IEE") at the school's expense. The school agreed the 2015 evaluation was no longer current and offered to reevaluate the student. The parents declined and insisted on an IEE. After the school refused to pay for the IEE, the parents requested a due process hearing.

The school argued that the student's objection to the 2015 reevaluation was untimely under IDEA's two-year statute of limitations and, even if timely, the student was not entitled to an IEE under IDEA. The hearing officer held that the statute of limitations did not bar the student's claim but that she did not have a right to a public-financed IEE.

ii. Issue: Whether the student was entitled to a publicly funded IEE? If so, would the IEE focus on whether a school's evaluation was appropriate at the time it was completed, or would it evaluate the child's current condition and needs going forward?

iii. Holding: Parents may request an IEE at public expense if they disagree with the school's evaluation. The school must respond to a reevaluation request by either (1) defending the reevaluation at a due process hearing or (2) providing the requested IEE at its expense. IDEA further requires a parent to bring a due-process complaint within two years of the date the parent knew or should have known about the alleged action that forms the basis of the complaint, rather than when the school's unlawful action occurred.

As the court noted, the parent's decision to dispute the 2015 reevaluation was strategic. A changed condition is not the same as a disagreement with an evaluation. By claiming the 2015 reevaluation was never accurate, thus constituting a disagreement with it, the parents were trying to force the school to pay for an IEE, rather than get a new reevaluation for a changed condition. The hearing officer incorrectly believed the parents were asserting the 2015 reevaluation only became inadequate after the concussion, not that it was always inadequate, as the parents actually argued. Thus, the court remanded the case for the hearing officer to determine: (1) the reason or reasons why the parents contend that the 2015 reevaluation was inadequate at the time it was completed; (2) when the parents knew or should have known of those problems; and (3) whether the due process complaint filed by the parents was timely.

The court further addressed what the IEE should address if the claim was not time-barred: would the IEE focus on whether the 2015 reevaluation was "appropriate" at the time it was completed; or, as the parents argue, would the IEE instead focus on the Student's current needs? The court ruled that the IEE must focus on whether the 2015 evaluation was "appropriate" at the time it was completed, finding that that parents' assertion would substantially undermine the reevaluation process established by IDEA. Specifically, instead of requesting a reevaluation, parents could wait a year or two and dispute the past evaluation, even after changed circumstances, and force the school to pay for an IEE, essentially minimizing the role schools have in the process.

Thus, the court concluded that if an IEE was ordered, it must focus on whether the 2015 reevaluation was "appropriate" at the time it was completed, not after the 2017 concussion or the child's current condition. If the parents want a publicly funded IEE with respect to the child's current condition and needs going forward, then they must follow IDEA's reevaluation procedures and allow the school to do a reevaluation first.

iv. **Implications:** This case may be relied on in the future to challenge a parent's demand for an IEE of a student's current condition years after a district evaluation was conducted. This case stands for the proposition that an IEE should be aimed at showing why a district's evaluation was inappropriate at the time it was conducted rather than being used by parents to obtain an evaluation of current conditions by their hand-selected expert.

V. IEP IMPLEMENTATION

a. *In re: Student with a Disability*, MDE Case No. 19-095C (June 25, 2019)

i. **Facts 1 – Implementation of IEP:** The complainants allege that when the student's special education teacher was on leave during the prior calendar year, the district failed to ensure the student was working on and making progress toward IEP goals and objective. The teacher was absent for 19 cumulative school days, and the district hired substitute teachers to cover the absences. The teacher left notes and lesson plans for the substitutes, but they did not identify all of the teacher's responsibilities related to the student's IEP. For example, one note stated that the teacher let students sit where they like, but it did not mention that the student's IEP required preferential seating near the speaker and away from noise. The district did not provide or make accessible to the substitute teachers

the student's IEP, which, according to other staff, was not uncommon for the district when hiring substitute teachers.

Facts 2 – Transition Services: The complaint further alleged that the district failed to properly determine the student's transition services. The student had transition planning in her IEP since grade nine, and her April 2018 IEP, in effect for the duration of this complaint, provided the Student with transition services during the 2018-19 school year. The parents claim they were never made aware of the student's right to continued services past 12th grade if needed.

ii. Issue 1: Did the district fail to properly implement the student's IEP, and therefore fail to provide a FAPE, when the substitute teachers were unaware of and failed to implement the student's IEP services?

Issue 2: Did the district fail to incorporate appropriate transition services in the student's IEP?

iii. Holding 1: Yes, because under IDEA, a substitute teacher must be aware of his or her specific responsibilities under a student's IEP. Here, the teacher prepared notes and lesson plans for each substitute, ensuring students had access to their special education curriculum, but the district failed to make the child's IEP accessible to the substitute teachers, so they were unfamiliar with the student's specific IEP requirements. As a result, the substitutes were unaware of the IEP and were unable to provide the child with appropriate services in violation of IDEA. As a remedy, the MDE instructed the district to conduct staff training on IDEA requirements to ensure special education students receive a FAPE during teacher absences.

Holding 2: Yes. The MDE stated that although the district developed IEPs with appropriate transition goals and services, the student's IEPs inappropriately planned for the student to graduate with a regular high school diploma, which would have ceased the provision of special education and related services, including transition services, which the student still needed. Thus, the student's IEP was not in compliance with federal or state law and was not appropriately ambitious for the student in order to provide her a FAPE. As a remedy, the MDE instructed the district to train special education staff members regarding their responsibility to provide a FAPE and to discuss each student's need for transition programming after age 18, based on evaluations and IEPs.

iv. **Implications 1:** If a student's special education teacher is absent, districts should take measures to ensure that the substitute understands her responsibilities under the student's IEP, including providing a copy of the IEP to the substitute if necessary and explaining how to provide the child appropriate services and accommodations.

Implications 2: Districts must ensure that IEP teams consider whether a special education student will need additional services beyond the age of 18 and the standard graduation date for the student's class.

b. *Ada-Borup ISD*, MDE Case No. 19-004C, 74 IDELR 120, 118 LRP 42675 (September 20, 2018)

i. **Facts:** According to the student's IEP, he was to receive 20 minutes of speech and language services once per week. This amount was also reflected in the prior written notice sent to the student's mother. However, during the school year, the student actually received 20 minutes of speech and language services twice per week, double the amount called for in his IEP. His mother filed a complaint, alleging that the district failed to provide speech or language services to the student according to his IEP. The district alleged that there was a clerical error in the IEP, and that the student was always intended to receive 20 minutes of speech and language services twice per week, even though the IEP stated that he was to receive the speech and language services once per week. As evidence, the district provided an IEP team member's handwritten notes which reflected that during the IEP meeting, the IEP team discussed providing the student with speech instruction "2x a week."

ii. **Issue:** Did the district fail to properly implement the student's IEP and violate IDEA by providing double the amount of speech services provided for in the IEP?

iii. **Holding:** Yes. The IEP team discussed providing speech and language services to the student twice a week, but wrote in his IEP that he would receive the services only once per week. By providing the services twice per week as discussed in the meeting, the district did not implement the IEP as written. The MDE held that this misunderstanding between what was discussed during the meeting and what was written was no excuse for the district's failure to implement the IEP as written, as required by IDEA. The MDE explained that when a parent is unaware of the services offered to a student because of the IEP's inaccurate content, the parent cannot monitor or enforce school district compliance with the IEP. Because the district provided additional services without either providing prior written

notice of the proposed change or obtaining the parent's written consent to those additional services, the MDE concluded that the district violated IDEA. The MDE instructed the district to train its staff on the federal and state requirements on IEP implementation, prior written notice, and parent participation.

iv. **Implications:** As is the case when a school fails to provide all services outlined in an IEP, providing additional amounts of services not called for in the IEP can be a violation of IDEA. Ensure that staff are providing prior written notice and updated IEPs for any change in services.

c. *Bloomington ISD*, MDE Case No. 18-104C, 73 IDELR 191, 118 LRP 39007 (July 2, 2018)

i. **Facts:** During the time period covered by the complaint, the adult student received homebased special education services and had only minimal access to the general education curriculum. The student and parent requested additional academic instruction in general education coursework and requested instruction through alternative means, but they reported that the district's response to each of their suggestions or request was that the district would "look into it" but then never follow up. The student received academic support from a general education teacher for about nine months, but after she left her position, the student alleged that the district said no other teacher could work with him at his home. He alleged that he discussed the college level examination program (CLEP) with the district and was open to other options for accessing the general education curriculum, but claimed the district never offered any. Although the student had assigned special education teachers, they generally did not provide him with general education academic content, though they helped him with it to some extent. This was partially because the special education teachers did not feel qualified to provide general education academic instruction.

The student then filed a complaint with MDE, alleging that he did not receive services in conformity with his IEP. Specifically, he asserted that his special education and related services were not always provided as scheduled or at all and that the district failed to follow-up on services for ACT, CLEP, or SAT testing, as he had requested.

ii. **Issue:** Did the district fail to provide the services required in the student's IEP?

iii. **Holding:** Yes. MDE noted the standard set forth in the *Endrew F.* case, which held that "to meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances," and the IEP "must be appropriately ambitious in light of [the student's] circumstances." *Endrew F. ex rel. Joseph F. v. Douglas County Sch. Dist. RE-1*, 137 S. Ct. 988, 1000 (2017). This means "the adequacy of a given IEP turns on the unique circumstances of the child for whom it was created," and an IEP for a student who is not fully integrated in the regular classroom must be appropriately ambitious in light of the circumstances. In addition, an IEP must include modifications or supports for school personnel to enable the student to be involved in and make progress in the general education curriculum. *See* 34 C.F.R. 300.320(a)(4).

The evidence showed that the student did not have sufficient access to the general education curriculum for most of the school year because of the district's failure to provide the student with the academic and curriculum support provided in his IEP. MDE pointed out that given the student's well-established ability to excel academically, and his goal of attending college, the student's IEP did not meet the "appropriately ambitious" standard set forth in the *Endrew* case. Thus, MDE concluded that the district's failure to provide the student with the required services in his IEP, and its failure to develop an appropriately ambitious IEP that allowed the student to be involved and make progress in the general education curriculum in accordance with his abilities, caused the student educational harm and denied the Student a FAPE. The MDE instructed the District to convene the IEP team to determine the type and amount of compensatory education services to be provided the student.

iv. **Implications:** If a student receives home-based instruction, a district must provide the student access to the general education curriculum in accordance with his or her IEP. If there is no teacher who can provide homebound instruction, a district should consider hiring one or find some alternative method of instruction or alternative means for the student to access the general education curriculum, such as online instruction.

d. *Prior Lake-Savage (MN) Area Schools*, OCR 05-18-1262, 74 IDELR 237, 119 LRP 13199 (September 17, 2018)

i. **Facts:** The parent of a student with a disability filed a complaint with the OCR, alleging that the district discriminated against her daughter and retaliated against her for advocating on behalf of her daughter. Specifically, the parent alleged that the district failed to implement several

provisions of the student's IEP regarding paraprofessional support, movement and sensory breaks, self-advocacy goals, and more. She claimed the district retaliated against her by prohibiting her from communicating directly with the student's paraprofessional.

ii. **Issue 1:** Did the district properly implement the IEP?

Issues 2: Did the district retaliate against the parent in violation of Section 504 when it prohibited her from communicating with her daughter's paraprofessional after she advocated on behalf of her daughter?

iii. **Holding 1:** Yes. With respect to paraprofessional support, the parent and district disagreed over the meaning of "child specific" paraprofessional support. The parent believed this meant one paraprofessional would provide exclusive support to the student, while the district interpreted it to mean an employee specially trained to work with the student would provide support but not exclusively to that student. The OCR ruled there was insufficient evidence the district failed to implement this aspect of the IEP, and noted that the parent should file a due process complaint for challenges to the appropriateness of district decisions regarding placement and services. The OCR also found no evidence that the district failed to implement the other services and requirements in the student's IEP.

Holding 2: No. Under Section 504, a district engages in unlawful retaliation when it takes an adverse action against an individual either in response to the exercise of a protected activity, or to deter or prevent protected activity in the future. The OCR explained that a case of retaliation requires a connection between the protected activity and the adverse action. The OCR determined that the parent's advocacy on behalf of her daughter was a protected activity. However, the district provided the OCR with an email that it sent to the parent, which stated in part: "[i]t is [District Procedure] to not have any paraprofessionals communicating directly with parents. Paraprofessionals work under the supervision of the building principals." The date of the email revealed that the district had prohibited the parent from contacting the student's paraprofessional prior to the parent engaging in the protected activity. Because the alleged adverse action of the ban on parent-paraprofessional communications occurred before the parent's advocacy, the parent could not establish that the two events were causally connected. The OCR concluded that there was insufficient evidence to determine that the district retaliated against the parent or discriminated against the student. Thus, by showing its practice of not having parents speak directly to paraprofessionals pre-

dated the parent's advocacy on behalf of her child, the district defeated the claims that it retaliated against the parent in violation of Section 504.

iv. Implications: It is important to make sure parents and staff have the same understanding of what is required in a student's IEP for services and accommodations. This case is a good example of what can happen when an IEP is not fully understood by the parent and the terms are arguably vague or can be interpreted several different ways.

Additionally, as explained in this case, Section 504 prohibits school districts from retaliating against parents for their advocacy on behalf of their children with disabilities. If a district must take an adverse action against a parent, having appropriate documentation of when and why it took that action can help defeat a retaliation claim. Here, the district successfully defended against a retaliation claim by showing that it typically did not allow direct communications between parents and paraprofessionals, and that the parent was informed of this practice before she advocated on behalf of her child.

VI. DISCIPLINE

a. *Columbia Heights ISD 0013-01*, MDE 19-035C, 74 IDELR 273, 119 LRP 13968 (January 22, 2019)

i. Facts: After a behavioral incident at school, the district suspended a student for five days and extended it five days, for a total of ten days. The IEP team met to conduct a manifestation determination review, and it concluded that the student's misconduct was a manifestation of his disability. During the student's suspension, the district proposed a change of placement for the student, did not provide alternative educational services starting on day six of the suspension, and its special education director informed the mother that the student could receive services at home or none at all and was not permitted to return to school. The mother filed a due process complaint, alleging that the district's refusal to allow her son to return to school violated IDEA.

ii. Issue: Did the district violate IDEA by failing to return the student to his regular placement after the behavior incident at school?

iii. Holding: Yes. The MDE explained that under IDEA, if a district determines that a student's misconduct is a manifestation of a disability, it must either conduct an FBA and implement a BIP, or review an already-developed BIP and determine if any modifications need to be made. *See* 34 C.F.R. § 300.530(f). Either way, a district must return a student to the

placement from which he or she was removed unless the parent and district agree to a change in placement. *Id*.

Here, after determining the behavior was a manifestation of the student's disability, the district failed to conduct an FBA and develop a BIP or to review and modify the student's existing BIP in violation of IDEA. Specifically, the district did not provide any evidence that the IEP team reviewed the student's BIP and determined whether modifications were necessary to address his behavior. Additionally, the MDE concluded the district violated IDEA when, after the manifestation determination and the requisite special circumstances did not exist to remove the student to an interim alternative educational setting, the District failed to return the student to the placement from which he was removed and ultimately removed the Student from school for more than ten consecutive days. *See* 34 C.F.R. § 300.530(g). The district also violated state law by failing to provide alternative education services beginning day six of the suspension. *See* Minn. Stat. § 121.43(c). The MDE ordered the district to, among other things, return the student to his regular placement, conduct an FBA, and review and revise the student's BIP, as necessary. It also ordered the IEP team to reconvene and determine the appropriate compensatory education for the student.

iv. **Implications:** Under IDEA, if an IEP team determines that a student's misconduct was a manifestation of his disability, it must then conduct an FBA and develop a BIP, or review the student's BIP and revise it as necessary. In addition, unless the IEP team agrees to a different placement, the student must be allowed to return to his regular placement. Here, when the IEP team determined that the student's conduct was a manifestation of his disability, it should have conducted a FBA or reviewed the student's BIP, and should have allowed the student to return to school after the ten-day suspension.

VII. PARENTAL PARTICIPATION

a. *Eastern Carver County (MN) School District,* OCR 05-18-1240, 74 IDELR 144, 119 LRP 3225 (August 30, 2018)

i. **Facts:** In this unique case, both the student and his mother had disabilities. The son had a learning disability, ADHD, depression, and a cognitive disability. The mother claimed the district discriminated again her son when it failed to implement several provisions of his IEP, and also discriminated against her when it refused to grant her requested accommodations to participate in IEP meetings. The OCR dismissed the

claim of discrimination against her son because she had already filed an identical claim with the MDE, which was not yet complete but could be reviewed by the OCR after completion.

As for the alleged discrimination against herself, the student's mother claimed that she offered to provide the district with a copy of a letter from her psychiatrist that would verify her disabilities, which included generalized anxiety disorder, major depressive disorder, and cognitive disabilities, and would support her need for accommodations, but the letter was written after three of the four IEP meetings were conducted during the school year. The mother had requested, among other things, that the district provide her written notification of the topics to be discussed at her child's IEP meetings so that she could research and understand the information. The district also provided the mother with a copy of meeting agendas, allowed her to audio record the IEP meetings, and provided her a copy of the IEP along with a link to the district's manual describing the IEP process. In addition, the district's special education director invited the mother to meet with him individually in advance of the IEP meetings to discuss the process, the student's services, and the IEP documents, but the mother did not accept the invitation. The district even rescheduled IEP meetings several times to accommodate the mother. Nonetheless, the mother filed a complaint with OCR, alleging that the district discriminated against her based on her disability.

ii. Issue: Did the district discriminate against the mother by not providing her with specific accommodations during her child's IEP meetings?

iii. Holding: No. The OCR explained that the prohibition against disability-related discrimination found in Section 504 and ADA Title II applies to all persons with disabilities, including parents. However, the OCR explained that the facts and evidence here clearly demonstrated the district took steps to accommodate the parent, even though she did not timely provide documentation of her disability and rejected several of the offered accommodations. Thus, the OCR concluded that the district responded reasonably and appropriately to the mother's requests for the provision of reasonable accommodations at the student's IEP meetings and dismissed her complaint.

iv. Implications: A district may have an obligation to provide accommodations to parents so that they can participate in the IEP team process.

b. *In re: Student with a Disability*, MDE 18-115C, 74 IDELR 184, 118 LRP 38991 (August 17, 2018)

i. Facts: A mother of a student filed a complaint after the district held an IEP meeting regarding the student without her. The district alleged that it scheduled the meeting after a conversation with the mother where she orally agreed to meet on a certain day. The mother acknowledged having this conversation but disputed reaching an agreement as to the day of the meeting. Two days before the meeting, the district sent a letter and left the mother a voicemail. The mother denied receiving either. Consequently, she alleged that the district failed to notify her of the IEP meeting and therefore the district did not afford her the opportunity to participate in the IEP meeting.

ii. Issue: Did the district provide sufficient notice to the mother in order for her to participate in the student's IEP meeting?

iii. Holding: No. The MDE explained that IDEA requires districts to take steps to ensure one or both of the parents of a child with a disability are afforded the opportunity to participate in each IEP meeting, which includes notifying the parents early enough and scheduling the meeting at a mutually agreed upon time and place. *See* 34 C.F.R. § 300.322(a). The MDE concluded that the district's one letter and voicemail sent two days before the scheduled IEP meeting were not enough notice in order for the mother to have the opportunity to attend and participate in the student's IEP meeting. The MDE further noted that on the day of the IEP meeting, the district knew that the mother had not responded to any of its alleged attempts to contact her. The MDE held that the short notice, combined with the district's decision to hold the IEP meeting despite no response from the mother, denied her the opportunity to participate in the IEP process. The MDE instructed the district to reschedule the IEP meeting and to revise its policies regarding adequate steps to ensure students' parents are provided the opportunity to participate in IEP meetings and to keep a record of its attempts to arrange a mutually agreed upon time and place.

iv. Implications: To help ensure parent participation and to have a record of adequate notice, districts should provide written notice, by letter and/or email, of the scheduled meeting date well in advance of the meeting date.

VIII. CHILD FIND

a. *Independent School District No. 283 v. E.M.D.H.*, 357 F. Supp. 3d. 876 (D. Minn. 2019).

i. Facts:

1. **Elementary School and Middle School.** The student performed well academically in elementary school. In sixth grade, which was the student's first year of middle school, she participated in gifted and talented programming and earned As and Bs in her classes. However, in March of her eighth grade year, the student stopped attending school and was diagnosed with depression and generalized anxiety disorder. She was then admitted to a day treatment program. When the student stopped attending school, a teacher brought the student's attendance issues, diagnoses, and day treatment placement to the student support team for discussion. The team decided not to refer the student for an evaluation, because she had been doing well when she attended. The team also agreed to give the student "incompletes" rather than failing grades for the second semester.

2. **High School:** The student's attendance continued to be irregular in ninth grade. Later that year, she was diagnosed with ADHD. She missed many days of school during various day treatment placements. At the start of her sophomore year, the District wrote a 504 Plan for the student, even though it never evaluated her under Section 504 or the IDEA. The Section 504 plan gave the student additional time to complete assignments. In January of the student's sophomore year, a school counselor met with the student's mother and stated that if the student was evaluated and found eligible for special education, she would need to receive some of her instruction in a structured study hall. The district did not propose an evaluation and the parent did not request one at that time. In April of her sophomore year, the student was diagnosed with major depressive disorder, ASD, ADHD, general anxiety disorder with panic and OCD features, and features of borderline personality disorder. In June of the student's sophomore year, the district proposed a special education evaluation but stated it would not do the evaluation until the fall.

3. **Evaluation:** The district evaluated the student in the fall of her junior year, but found the student did not qualify in any area,

including ASD, EBD, and OHD. The district did not complete two systematic observations because the student continued to be absent from school frequently. The district failed to conduct an FBA as part of the EBD evaluation.

ii. Holding:

1. **Child-Find:** The record showed that the district was aware, no later than the spring of 2015, that the student had stopped attending school because of her anxiety. The district appropriately engaged with the parents concerning the student's absences in eighth grade, including seeking information from the student's therapists and other mental health providers. This involvement, however, is precisely what gave the district the reason to identify the student as a possible child with a disability. By not acting on that information, the Court concluded, as did the ALJ, that the district failed to fulfill its child-find obligations with respect to the student.

2. **Deficient Evaluation:** The Court concluded, as did the ALJ, that the student was eligible for special education and related services under both federal and state eligibility guidelines. Specifically, the student met the federal and state definitions of both EBD and OHD. The student's mental health issues—her several diagnoses as of May 2017—appeared to have directly impacted her attendance at school. As the ALJ noted, there was no evidence in the record that anything but her mental health issues caused her absenteeism. The district contended that the student's mental health issues and absenteeism did not adversely impact her educational performance because she excelled academically when she attended school. For the same reasons the ALJ provided, the Court also rejected this argument. Specifically, special education is designed to help students with disabilities progress in the general curriculum. *See* 34 C.F.R. § 300.320. No one disputes that the student excelled on standardized tests, but no one can dispute that her absenteeism inhibited her progress in the general curriculum.

iii. Implications: Staff cannot overly rely on a student's ability to earn good grades in determining whether an evaluation may be warranted or a student may be eligible for services. This case is also on appeal to the Eighth Circuit.

IX. OCR AND MDHR INVESTIGATIONS

a. OCR and MDHR both have the right to investigate complaints of discrimination on the basis of disability. OCR reviews alleged violations of Section 504 and the MDHR reviews violations of the Minnesota Human Rights Act ("MHRA").

b. Both entities allow a written response, including evidence in support of the school district's position, and most of the time will follow up with fact-finding interviews. OCR in particular can have extensive document requests.

c. Both processes can be lengthy, lasting well over a year.

RASW: 145797