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Important Special Education Cases and the More Important Takeaways

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I. CASES APPEALED TO THE U.S. SUPREME COURT.

A. **First Amendment and Students**. With respect to students, the United States Supreme Court has identified four situations that give school districts the authority to limit student speech or discipline students for their speech.

1. The School District may prohibit speech that is reasonably likely to lead to a substantial disruption or material interference with school activities or an invasion of the rights of others. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

2. The School District may prohibit speech that is "plainly offensive" or promotes activities or products that are illegal for minors if so doing is reasonably related to a legitimate pedagogical concern. *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986).

3. The School District may exercise considerable control over "school sponsored speech," such as a school newspaper, yearbook, or other school publication. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

4. The School District may prohibit student speech that endorses or promotes the use of illegal drugs. *Morse v. Fredrick*, 127 U.S. 2618 (2007).

B. ***B.L. v. Mahanoy Area Sch. Dist.*, 964 F.3d 170 (3d Cir. 2020**).

1. **Background Information**:

B.L., a sophomore, was placed on the junior varsity cheer team for the second year in a row. She was frustrated by this placement, particularly because a first-year student had made the varsity cheer team. She was also stressed about upcoming exams, and frustrated with her assigned position on the softball team. So, she took to Snapchat to vent, and posted a photo of herself and a friend with their middle fingers raised on her Snapchat story, which she captioned "F*** school f*** softball f*** cheer f*** everything" and added a message referring to how she had been told she needed a year of junior varsity experience before she could make the varsity cheer team, but apparently that requirement did not matter to anyone else.

Several students approached the cheerleading coaches about B.L.'s Snapchat story, and she was suspended from the cheer team for one year, on the grounds that she had violated the team's rules regarding respect for coaches and appropriate online behavior. Additionally, the coaches felt that B.L. had violated a school rule requiring student athletes to "conduct themselves in such a way that the image of the Mahanoy School District would not be tarnished in any manner."

2. **Issue**: When can school districts discipline students for off-campus speech?

3. **Holding**: The Third Circuit Court of Appeals ruled in B.L.'s favor, finding that her Snapchat was off-campus speech, and therefore not subject to *Fraser*. Disagreeing with other Circuits, including the Eighth

Circuit, the Third Circuit also concluded that *Tinker* did not apply to B.L.'s off-campus speech.

4. **Takeaway**: The U.S. Supreme Court is reviewing the Third Circuit's decision, and oral argument will take place on April 28, 2021. The U.S. Supreme Court's decision will be precedential across the country, including in Minnesota. Stay tuned!

    a. Note: The Third Circuit is the only Circuit that has concluded that *Tinker* does not apply to off-campus speech. Five other Circuits, including the Eighth, have all held that *Tinker* does apply off-campus, and the remaining six have not addressed the issue. *See C1.G v. Siegfried,* 477 F.Supp.3d 1194, 1205 (D. Colo. 2020) (collecting cases).

5. **Other Note**: B.L. made the varsity cheer team the following year.

II. CASES BEFORE THE EIGHTH CIRCUIT COURT OF APPEALS.

A. *Indep. Sch. Dist. No. 283 v. E.M.D.H.*, 960 F.3d 1073 (8th Cir. 2020).

1. **Background Information**:

In March 2015, when the Student was in eighth grade, the Student stopped attending school completely and was soon after diagnosed with "depression not otherwise specified and generalized anxiety disorder" at a psychiatric evaluation. When the Student stopped attending school, one of her teachers brought her concern to a group consisting of the Student's teachers and the Dean of Students, but "the group decided not to refer the Student to the District's Student Intervention Teacher Team ("SITT"), which is one of the District's child-find activities." The group reasoned that the Student's grades "were excellent when she attended school." Furthermore, staff "were aware of the Student's mental health issues" and that the Student had been admitted to a day treatment program. The Student's attendance was again "irregular" in ninth grade.

In April of 2017, the Parents requested that the District evaluate the Student's eligibility for special education and the District agreed. The District never completed a functional behavioral assessment ("FBA") nor systematic observations in the classroom or other learning environment. The District concluded that the Student did not qualify for special education in the serious emotional disturbance/emotional behavioral disorder ("EBD") or other health disabilities ("OHD") categories.

2. **Issues**: Following a due process hearing, the Administrative Law Judge ("ALJ") held that: (1) the "District failed to conduct an appropriate evaluation;" (2) the Student qualifies for special education under the EBD and OHD categories; and (3) the District violated its child-find obligations. The District appealed to the federal district court in Minnesota. The federal district court held in favor of the Student. The District appealed to the Eighth Circuit Court of Appeals.

3. **Holding**: The Eighth Circuit affirmed the decision by the ALJ and partially affirmed the district court's decision.

    a. First, the Court noted that Minnesota law requires school districts "use technically sound instruments that are designed to assess the relative contribution of … behavioral factors" in conducting evaluations that determine eligibility under the Individuals with Disabilities Education Act ("IDEA"). Additionally, with respect to determinations regarding EBD and OHD, evaluators must include data from, among other sources, "systematic observations in the classroom or other leaning environment." In addition, concerning EBD, evaluators must include data from an FBA. Therefore, because the District "concede[d] that it did not conduct any systematic observations of the Student in the classroom or an FBA," the Court concluded that the District's evaluations of the Student were deficient under Minnesota law.

    b. Second, the Court concluded that "the Student is eligible for special education and related services under both federal and state eligibility guidelines" for EBD and OHD because the Student's mental health issues "appear to have directly impacted her attendance at school," which "inhibited her progress in the general curriculum."

    c. Third, the Court concluded that the District failed its child-find obligations with respect to the Student because it was aware no later than the spring of 2015 that "the Student had stopped attending school because of her anxiety" and did not act on this information.

    d. Last, the Eighth Circuit determined that some claims accrued within the limitations period because of the District's continued violation of the child-find duty.

4. **Takeaways**:

a. Chronic Absenteeism and Child Find. Students' absences can be relevant in the "child find" process. While a Student's attendance problems do not automatically trigger a school district's "child find" obligations, *Round Rock Independent School Dist.*, 25 IDELR 336 (SEA July 8, 1996), a school district's "child find" obligation may be triggered where there are significant absences, a reason to believe the absences are linked to a disability, and a need for services.

b. "Out of Sight" Cannot Mean "Out of Mind." In responding to excessive student absences, it is important that educators are proactive. Not only will responding proactively to students' absences benefit the school district in this context by lowering the chances of costly administrative proceedings, it will also help students get back in school and resume learning.

5. **Other Notes**.

a. RRM did an amicus brief on IDEA's statute of limitations.

b. Petition for Certiorari to the United States Supreme Court docketed.

B. *Richardson v. Omaha Sch. Dist.*, 957 F.3d 869 (8th Cir. 2020).

1. **Background Information**:

L's parents filed a due process complaint alleging, as relevant, that the District failed to ensure that L was not bullied by peers and teachers. The ALJ held for the District. Specifically, the ALJ concluded that only one of the four alleged incidents might constitute bullying, and that, in any event, the District did not deny L a FAPE based on the alleged incidents. The alleged incidents are: (1) an allegation of peer bullying where the parents were contacted and the peer was disciplined; (2) L feeling bullied when a peer told him to put his name on a class paper, which the relevant teacher was informed of; (3) a teacher telling L to stop moving in his seat, because she did not know that he has from "tics" as a result of his ASD; and (4) allegations that L was bullied in class and the teacher was nonresponsive to his requests for help.

The parents then brought a lawsuit against the District, alleging violations of Section 504 of the Rehabilitation Act ("Section 504") and Title II of the Americans with Disabilities Act ("ADA"). The district court granted summary judgment to the District. The parents appealed.

2. **Issues**: The relevant claims were brought under Section 504 and Title II of the ADA. The issue relevant to both claims is whether the District acted in bad faith or with gross misjudgment.

3. **Holding**: The ADA and Section 504 claims were based on alleged peer and teacher bullying of L. In its brief to the Eighth Circuit, the District argued that it would be "legally untenable" to conclude that the District violated the ADA and Section 504 in this instance when the ALJ concluded that it acted in a manner that fully complied with the IDEA, which does not have a bad faith or gross misjudgment standard. The Eighth Circuit did not directly address the argument. The Eighth Circuit held that the District did not act in bad faith or with gross misjudgment, as required by both Section 504 and the ADA.

4. **Takeaways**:

   a. Practical Tips to Keep Students Safe.

      i. Be Proactive. Address student misconduct or inappropriate behavior before it reaches the level of bullying or harassment, if possible. Like math or science, educators can also teach students how to treat their peers better. "Indeed, at least early on, students are still learning how to interact appropriately with their peers. It is thus understandable that, in the school setting, students often engage in insults, banter, teasing, shoving, pushing, and gender-specific conduct that is upsetting to the students subjected to it." *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 651-52 (1999).

      ii. Consistently Respond to Allegations of Harassment and Bullying. Take all alleged bullying and harassment seriously and consistently respond to the allegations. This will help keep students safe. In addition, responding to allegations of potential harassment, including investigation and, if warranted, appropriate discipline, reduces the possibility that the School will be found liable for peer-to-peer harassment. A consistent response will also help public

perception by showing that the school district takes seriously bullying and harassment allegations.

iii. Keep Parents Informed. Always notify parents of any bullying incidents. Informing parents about bullying that is going on at school may make those parents aware of bullying that is occurring at home. A school's ability to punish a student's behavior for off-campus, online bullying is limited, and increased parental monitoring may limit bullying in ways that a school cannot.

5. **Other Note**. Petition for Certiorari to the United States Supreme Court docketed.

C. *Osseo Area Schs. v. M.N.B.,* 970 F.3d 917 (8th Cir. 2020).

1. **Background Information**:

M.N.B. resides in Big Lake District. She requires special education. The Student's IEP calls for individual transportation to and from school and places her at Karner Blue Education Center ("Karner"). The Student attended Karner during third and fourth grade. Accordingly, while the Student was in third and fourth grade, Big Lake District reimbursed M.N.B.'s mother based on mileage driven to and from Karner.

For M.N.B.'s fifth grade year, the mother applied under Minnesota's open enrollment program for M.N.B. to enroll in Osseo Area Schools ("District"). Upon approval, M.N.B. was enrolled in the District and began attending the North Education Center ("School"), which is located five miles from the District and thirty-four miles from M.N.B.'s residence. The IEP developed at Big Lake District remained in effect during the court proceedings. As such, the School "is not located in the district where the student resides and is not the placement agreed upon by parents and school officials in the IEP that called for individual transportation."

The mother sought reimbursement for mileage costs between M.N.B.'s residence and the School. The District maintained that because M.N.B. resided in Big Lake and attended the School via placement by it through the open enrollment program, it was only required to reimburse the mother for mileage costs from the border of the District to the School. The District declined to reimburse the mother for mileage costs between M.N.B.'s residence and the District's border.

The District requested a due process hearing to address whether the District had to reimburse the full amount of transportation costs pursuant to IDEA. The ALJ ruled that the District was "required to reimburse the cost of transportation for the full distance between M.N.B.'s home and the school in which the Osseo District placed her." The District challenged the decision in district court. The district court granted summary judgment in favor of the mother, reasoning that "[b]ecause the District is responsible for providing M.N.B. with a FAPE, it is necessarily responsible for providing her with specialized transportation as stated in her IEP." The District appealed to the Eighth Circuit.

2. **Issues**: "[W]hether the IDEA requires a school district that enrolls a nonresident student like M.N.B. to provide transportation between the student's home and the school district where her parent has chosen to enroll her?"

3. **Holding and Takeaways**: IDEA does not require a school district that enrolls a nonresident student like M.N.B. to provide transportation between the student's home and the school district where her parent has chosen to enroll her.

   a. First, the Eighth Circuit held that the State of Minnesota "satisfied the obligation to provide a FAPE when the Big Lake District reimbursed the cost of transporting M.N.B. to and from the school that was agreed upon in her IEP[, Karner,] … and the IDEA does not unambiguously require the State to do more because M.N.B.'s parent unilaterally chose to enroll the student elsewhere."

   b. Second, the Court held that "the IDEA does not require the District to reimburse M.N.B.'s parent for the cost of transportation between her home and the border of the District" under the circumstances in the case. The Eighth Circuit reasoned that "governing Minnesota statutes and rule provide that when a school district enrolls a student through the open enrollment program, it must provide transportation only 'within its borders' or 'within the district.'" Relatedly, "Minnesota law … provides that an enrolling district is responsible for transportation costs only within the district."

4. **Other Note**: Laura Tubbs Booth of RRM represented the District.

III. *MINNETONKA PUB. SCHS. V. M.L.K.*, NO. CV 20-1036 (DWF/KMM), 2021 WL 780723 (D. MINN. MAR. 1, 2021).

A. **Background Information**: The Student has "average intelligence combined with severe dyslexia, significant ADHD, a speech/language disorder, and mild Autism ('ASD')." The District conducted special education evaluations of the Student in both 2015 and 2018. In 2015, the District found the Student eligible for services under the ASD category. In 2018, "the District found that Student remained eligible for special education—and, in part, had continued needs in reading, phonics skills, math, writing, speech, language, social-skills and ASD-related needs."

The District implemented an IEP in 2015, "which it amended several times as Student progressed through the grade levels." " Student made progress in math, handwriting, speech and language, and social skills." The Student also made "some slight progress in particular [reading] skills," but "remained below or near a first-grade reading level for years."

On August 8, 2019, the Student's parents filed a special education due process complaint under the IDEA. Prior to the due process hearing, the ALJ issued an order denying the District's motion arguing that the IDEA statute of limitations limits Student's claims for compensatory education to those that occurred two years before the date Parents filed a due process complaint. The issues at the due process hearing included, but were not limited to, whether the Student met his burden to prove that the District failed to provide the Student with a FAPE and whether the District met its burden to prove that its 2018 evaluation of the Student was appropriate. The ALJ found that the Parents met their burden to prove that the District denied Student a FAPE and that the District did not meet its burden to prove that its 2018 evaluation was appropriate.

B. **Issues**:

1. What is the proper statute of limitations under the IDEA?

2. Did the District met its burden to prove that its 2018 evaluation of the Student was appropriate and did the Student met his burden to prove that the District did not provide the Student with a FAPE?

C. **Holding**:

1. The Court held that it was erroneous for the ALJ to use a limitations period that was longer than two years. Instead, the Court held that "unless and until the Eighth Circuit Court of Appeals rules otherwise, the proper

statute of limitations under the IDEA is two-years." Because the "Parents filed their due process complaint on August 8, 2019, any claims based on District actions before August 8, 2017 are untimely." As such, "reimbursement for any costs for compensatory education incurred before August 8, 2017 are not recoverable."

2. The Court affirmed the determination of the ALJ that the District did not meet its burden to prove that its 2018 evaluation was appropriate and that the District did not provide Student a FAPE. The Court found that "the District did not properly identify Student's most debilitating disabilities—dyslexia and ADHD"—and that the failure was not harmless. Instead, "the misclassification hindered the proper design of an IEP that would have met Student's reading needs" and "resulted in the District's failure to provide appropriate services to Student to ensure appropriate educational progress." As such, "the District did not respond with meaningful adjustments to Student's IEP" despite "years of very limited progress."

D. **Takeaways**: The Eighth Circuit's decision will be precedential in Minnesota - stay tuned!

E. **Other Notes**.

1. RRM represented the District.

2. Appeal and Cross-Appeal filed to the Eighth Circuit.

3. Minnesota School Board Association, Minnesota Association of School Administrators, and Minnesota Administrators for Special Education will file amicus briefs.

IV. CASES BEFORE STATE EDUCATION AGENCIES.

A. Minnesota Department of Education Complaint Decision 21-021C.

1. **Background Information**:

From March 30 through May 4, 2020 ("Distance Learning Period"), the District provided special education and related services to students via Individualized Distance Learning Plans ("IDLP"). The Student's IDPL provided for him to receive direct special education services remotely during the Distance Learning Period. As such, the District provided the Student a computer, provided step-by-step directions or information on the necessary passwords and links, and made new binders with work for

the Student each week. The District also made "repeated efforts" to connect with the staff of the place where the Student was living during the Distance Learning Period, but assisting the Student with school was "just not in their wheelhouse." District staff, however, reported that the Student "did not appear to engage with any of the materials that were provided to him" during the Distance Learning Period. Specifically, the Student did not log onto his computer, meet with paraprofessionals online, log onto his speech program, have any contact with his OT provider, complete any assignments, or send any "virtual communications" to District staff.

A new IEP went into effect in June 2020. The IEP provided that the Student required ESY services. The IEP did not provide additional information on the nature or amount of ESY services to be provided. The District offered ESY services based on a distance learning model. The Student's parent "declined" to have the Student participate because distance learning "didn't work" for the Student.

Prior to the 2020-21 school year, the District sent out communications to the Student's parent about when and how school was scheduled to start. The District began the 2020-21 school year in a hybrid learning model. Nonetheless, the Student did not attend any school during the 2020-21 school year until October 2020. In September and early October 2020, there were communications—a phone call and multiple e-mails—between the District and the Student's parent. On October 20, 2020, an IEP team meeting was held. During IEP team meeting, the Student's parent agreed to have the Student start attending school and the Student did so on October 22, 2020.

2. **Issues**: Did the District fail to provide the Student a FAPE when it did not provide the special education and related services to the Student that were in the Student's IEP?

3. **Holding**:

   a. The District did not provide the Student a FAPE from March 30, 2020 through October 22, 2020 when it failed to provide the special education and related services in the Student's IEP and IDLP. Specifically, the Student did not receive services in his IDPL based on "limitations required by the Distance Learning Period," the Student's "living situation," issues working with the staff of where the Student was living to support the Student access online materials and course content, and the Student's disability.

b. Likewise, during the 2020 summer, the Student was not provided ESY even though his IEP provided for him to receive ESY. The Student was not provided ESY because of the limitations required by the District's model, the Parent's continuing concerns regarding the Student's ability to benefit from distance learning, the IEP team's lack of discussion regarding modifications to the nature and type of the services to be provided to the Student during ESY, and the Student's disability.

c. Moreover, the District did not provide the special education and related services in the Student's IEP based on the limitations required by the District's Safe Learning Plan, communication issues between the District, the Parent, and where the Student was residing, and the Student's Parent's continued concerns regarding the effectiveness of distance learning for the Student and the requirements of transitioning the Student back into the school building, and the Student's disability.

d. The MDE determined that the Student was entitled to compensatory services due to the missed special education and related services. MDE also stated that "[a]ny compensatory services should be documented in the Student's IEP … and should describe the services to be provided along with the frequency, location, and duration of the services."

4. **Takeaways**: See Minnesota Department of Education Complaint Decision 21-035C takeaways below.

B. Minnesota Department of Education Complaint Decision 21-035C.

1. **Background Information**:

a. FAPE. From March 2020 until the end of the 2019-20 school year, the District provided special education services in conformity with the Student's IDLP. Relatedly, while staff were not able to collect information about the Student's progress toward all of his goals, the Staff did provide "activities connected to all of the Student's goals during the Distance Learning Period."

The Student's school operated in the hybrid model at the start of the 2020-21 school year. During this period, the Student had a contingency learning plan ("CLP"). The CLP provided that the Student would attend school in-person four days per week and have

one day of distance learning. When the Student received distance learning, the CLP provided for the Student to receive specific special education and related services. During the distance learning day, the Student did not participate in any online activities even though "[s]taff consistently offered and were available to meet virtually with the Student."

From late-September to early-October 2020, the Student needed to quarantine at home for 10 days after being in close contact with a COVID-19 positive person. During the Student's quarantine, the District offered to provide services to the Student but the Student's parent "refused to accept distance learning services and did not make the Student available for distance learning." As such, the Student did not receive special education and related services during the quarantine.

On November 30, 2020, the District began operating in a distance learning model for all students. The District did not offer any in-home or in-person services for students with disabilities for the first two weeks because it could not do so safely. "The Student did not participate in distance learning instruction during the District's closure of schools for in-person instruction and therefore did not receive any special education and related services for two weeks, from November 30 through December 11, 2020."

b. Transportation. The Student open enrolls in the District. The Student lives in a different school district. The District provided transportation to the Student prior to August 11, 2020. Effective August 11, 2020, the District decided it would no longer provide transportation outside of its borders or, in other words, it decided to transport non-resident students only within its borders. Instead, open-enrolled students outside of the District's border were required to provide transportation to a District bus-stop within the District or the Parents could transport students.

As a result, during fall 2020, the Student's Parent transported the Student to and from school. Nonetheless, the Student's IEP in effect at the start of the 2020-21 school year continued to provide the Student with special transportation to and from school daily. The IEP explained that the Student required special transportation because the Student is "vulnerable to strangers and is not able to make safe decisions."

In December 2020, the District revised the Student's IEP, including the special transportation section. In the revised IEP, the special transportation section stated that transportation is provided within District boundaries and a pick up/drop off location can/will be provided to the Parents unless they choose to transport the Student to and from school each day. In addition, the section stated that the Student would be provided transportation to and from home to ESY. No additional supplemental aids and services pertaining to transportation were included in the Student's IEP. The IEP went into effect in January 2021.

2. **Issues**:

a. Did the District provide the Student a FAPE from March 30, 2020 to December 7, 2020?

b. Did the District's transportation practices with respect to the Student comply with special education law?

3. **Holding**:

a. FAPE. The District provided special education services in conformity with the Student's IDLP from March 30, 2020 to the end of the 2019-20 school year.

The District, however, denied the Student a FAPE from the start of the 2020-21 school year to December 7, 2020. The Student did not receive special education and related services in conformity with the CLP. Specifically, the Student did not receive the services in conformity with the CLP during one day each week designated for the Student's distance learning instruction, the Student's 10 day quarantine during the fall in 2020, and during the two-week period when District schools were closed for all in-person instruction during the winter in 2020. The services were not provided in conformity with the Student's CLP "due to limitations resulting from the COVID-19 pandemic, including the need to protect the health and safety of students and staff, and due to the Student's disability-related needs, including the inability of the Student to access virtual learning without in-person support from District staff or parental assistance."

The District must "make an individualized determination as to the compensatory services needed to make up for any loss in the

Student's skills … and any lack of expected progress in the general education curriculum or toward any of the Student's IEP annual goals, that resulted from the District's inability to provide IEP services, or the Student's inability to access appropriate IEP services, during the COVID-19 pandemic. … Any compensatory services should be documented in the Student's IEP … along with the frequency, location, and duration of the services."

"The agreed-upon compensatory services do not limit the District's ability or obligation, when schools resume normal operations, to provide the Student with additional services needed to address any loss of skills or lack of progress due to the impact of the emergency suspension or in-person education during the COVID-19 pandemic."

b. Transportation. The District violated federal special education law "when it failed to ensure the Student's IEP team revised the Student's IEP to address the Student's anticipated transportation needs related to the August 2020 change in District policy regarding transportation of open-enrolled students." First, MDE concluded that a school district is not required to provide special education transportation to students with disabilities outside its borders. As such, the District's change in busing practices for the 2020-21 school year was permissible. Second, MDE concluded that it is "permissible for a school district to provide special education transportation for a student with a disability outside its borders. Specifically, … if a student's IEP team determines on a case-by-case basis that special transportation across district borders is necessary to assist that student benefit from special education, the school district may provide this special transportation and seek reimbursement …." Third, MDE concluded that the "Student's IEP team determined on a case-by-case basis that special transportation across district borders is necessary to assist the Student to benefit from ESY services during summer 2021." Fourth, MDE concluded that "the IEP team did not revise the Student's IEP to address the Student's anticipated needs related to the change in the pick-up and drop-off locations offered to the Student, including, as appropriate, supports to address the Student's vulnerability to strangers and need for personal safety."

As a result, the IEP team "must review and revise the Student's IEP, as appropriate, to include any supplementary aids and services

necessary to address the Student's transportation needs … while being picked up and dropped off at the District boundary."

4. **Takeaways**: MDE The traditional compensatory education definition and analysis are not currently being used by MDE for COVID-19 compensatory education services.

   a. Traditional Compensatory Education. Compensatory educational services are available generally when a school has failed to provide FAPE. Compensatory education traditionally includes direct and indirect special education and related services that are ordered by MDE or a hearing officer because the school did not offer or make available a FAPE and the student "suffered a loss of educational benefit." Minn. Stat. § 125A.091, Subd. 21.

   b. COVID-19 Compensatory Education Services. COVID-19 Compensatory Education Services are available regardless of any fault by the school or whether the parents or student had some responsibility for the failure of a FAPE to be provided or accessed by the student. It means direct and indirect special education and related services designed to "make up for any loss in the student's skills … and any lack of expected progress in the general education curriculum or toward any of the Student's IEP annual goals, that resulted from the District's inability to provide IEP services, or the Student's inability to access appropriate IEP services, during the COVID-19 pandemic." MDE, *Guide to Addressing the Impact of the COVID-19 Pandemic on Students with Disabilities* (Feb. 2021).

C. Minnesota Department of Education Complaint Decision 21-022C.

1. **Background Information**:

   During the 2017-18 school year, the Student received Title 1 services. The Student either met grade level expectations or was progressing in all areas. During the 2018-19 school year, the Student was provided Tier 2 interventions. Once again, the Student either met grade level expectations or was progressing in all areas. Nonetheless, the Student did have grades of "needs improvement" or "progressing" in many sub categories of reading and writing. During the 2019-20 school year, the Student met grade level expectations in all areas except for reading, writing, and math during the first trimester. In the aforementioned areas, the Student was deemed to be "progressing." Nonetheless, by the end of the third

trimester, the Student was meeting grade level expectations in reading, writing, and math.

During the 2019-20 school year, the Student's teacher expressed "concern" with the Student's "struggl[es] with reading." According to the Student's parent, the teacher reported that the Student was "reading and writing backwards" and "showing characteristics of dyslexia." The District also reported that the Student's grades and testing scores confirmed there was "some reason for concern." Specifically, the Student scored in the "high risk" range in adaptive reading and math during the fall, as well as "some risk" in the reading curriculum-based measure. The Student's scores, however, improved so much by winter that he was no longer considered high risk in any area. That winter the Student Intervention Team ("SIT Team") concluded that Tier 2 interventions were "effective" and that the Student did not need to be referred for consideration of Tier 3 interventions because of the progress the Student was making with Tier 2 interventions. The District's materials noted that for a student to be considered for Tier 3 interventions, the SIT Team needed to see evidence that Tier 2 interventions had been tried and were unsuccessful. Due to the COVID-19 pandemic, the District's schools were closed for typical in-school instruction from March 18, 2020 on. The District was unable to conduct testing in the spring of the 2019-20 school year.

The District began the 2020-21 school year in a hybrid model. When the Student returned to school, the Student's previously acquired skills had "significantly diminished" and the Student's test scores placed the student in reading in the "high risk range" and math scores in the "slight risk range." As such, the District provided the Student Tier 3 interventions. According to the District, the Student responded positively to the interventions. The special education director also stated a month after the Tier 3 interventions began that if the Student were not on a trajectory to grade-level skills after six to nine weeks, a referral for a special education evaluation would be appropriate.

2. **Issue**: Did the District violate its child find obligations during the 2019-20 and 2020-21 school years when it did not propose a special education evaluation for the Student?

3. **Holding**: The MDE found the District did not violate special education law. Minnesota law provides, in relevant part, that a school district "must conduct and document at least two instructional strategies, alternatives, or interventions using a system of scientific, research-based instruction and

intervention in academics or behavior, based on the pupil's needs, while the pupil is in the regular classroom" prior to referring a student for a special education evaluation. Minn. Stat. § 125A.56, Subd. 1. A special education team may waive the requirement if "it determines the pupil's needs for evaluation [are] urgent." *Id.*

Here, the MDE found that the Student's grades and test scores supported the conclusion that the interventions had been successful as outlined in Minn. Stat. § 125A.56, Subd. 1. Therefore, the District did not have a reason to suspect the Student was a child with a disability in need of special education and related services or have a duty to initiate a request for an initial special education evaluation of the Student.

4. **Takeaways**:

   a. Interventions Before Referral. Before a school district refers a student for a special education evaluation, the school must conduct two research-based pre-referral interventions. The classroom teacher is responsible for collecting data and documenting the results. "A special education evaluation team may waive this requirement when it determines the pupil's need for the evaluation is urgent." Minn. Stat. § 125A.56, Subd. 1(a).

      i. Note: This requirement may not be used to deny a pupil's right to a special education evaluation. *Id.*

   b. Qualifying Disability **AND** Need for Special Education. A student is eligible for special education if: the student has a disability that is identified and defined by federal and state administrative rules; and the student, because of his qualifying disability, needs special education. 34 C.F.R. § 300.8(a)(1); Minn. Stat. § 125A.02, subd. 1. As such, child with a qualifying diagnosis or disability is not "a child with a disability" if the student does not need special education. Too often evaluation teams "miss the forest for the trees" and focus exclusively on whether the student in question has a disability, condition, or diagnosis identified, rather than whether the student needs special education because of that diagnosis.