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FROM THE SCHOOLHOUSE TO THE COURTHOUSE:

Special Education Cases, Guidance and Other Developments

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FAPE - EDUCATIONAL BENEFIT – THE AFTERMATH OF ENDREW F.

A. *Endrew F. v. Douglas Co. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017). The Tenth Circuit's "merely more than de minimis" standard sets the bar too low when assessing whether a student with a disability has been provided with FAPE. From a substantive perspective, schools are to offer an IEP that is reasonably calculated to enable a child to make progress in light of the child's circumstances. Thus, the Tenth Circuit's finding that the district provided FAPE is vacated and remanded for further proceedings. [NOTE: On August 2, 2017, the Tenth Circuit vacated its decision and remanded the matter to the district court for further proceedings consistent with the Supreme Court's decision].

B. *M.L. v. Smith*, 867 F.3d 487 (4th Cir. 2017).

ISSUE: Is an IEP required to incorporate goals and objectives designed to teach the student about the laws and customs of Orthodox Judaism?

HOLDING: "The Plaintiffs erroneously read "other educational needs" as "all other educational needs." But the IDEA does not require a public school to account for every deficiency a disabled student might possess, just like a school does not have to exhaust

its resources to enable a nondisabled student to achieve his ultimate potential. *See Rowley*, 458 U.S. at 199 (concluding that the IDEA does not require "the furnishing of every special service necessary to maximize each handicapped child's potential"). Rather, the school must only "offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F.*, 137 S. Ct. at 999. The relevant circumstance here is that M.L. is disabled, not that he is of the Orthodox Jewish faith. As the Supreme Court reaffirmed in *Endrew F.*, "the IDEA cannot and does not promise any particular educational outcome," *id.* at 998, and it does not require one that furthers a student's practice of his religion of choice."

EXHAUSTION OF ADMINISTRATIVE REMEDIES

A. *Smith v. Rockwood R-VI School District*, 895 F.3d 566 (8th Cir. 2018).

ISSUE: Whether the exhaustion requirement applies where a defendant to the suit may not have been able to be added as a proper party to a due process action.

FACTS: A high school special education student was suspended from school for ten days. He attended school in one school district, but his IEP was administered by a different school district. Both school districts together with his IEP team held a manifestation hearing and concluded that the suspension was for conduct that manifested from his disability. Two days after the hearing, the superintendent informed the parents that the student would be suspended for an additional 180 days. The parents filed a due process hearing complaint. After the parties privately resolved the matter, the parents dismissed the due process hearing complaint.

The parents then brought a lawsuit in federal court alleging violations of the IDEA, the Rehabilitation Act, and Section 1983. The district court dismissed the suit for failure to exhaust administrative remedies.

RULING: "[T]he exhaustion requirement applies only if plaintiffs are seeking relief for the denial of a free appropriate public education. Exhaustion is not required if plaintiffs are seeking relief for simple discrimination."

"The district court complaint states that 'as a direct and proximate result of the long-term suspension, [the student] was excluded from and deprived of educational benefits' . . . Although plaintiffs allege 'disability discrimination' in other sections of the complaint, the gravamen of the complaint is the denial of a public education."

The court rejected the argument that "an exception should apply to the exhaustion requirement because [the school district he was attending] was not a proper party to the due process complaint and would have been summarily dismissed from any administrative proceedings." It reasoned: "A hearing held under . . . the IDEA . . . would nevertheless have provided the benefit of the administrative agency's expertise, as well a record for judicial review. Under these facts, we decline to create an exception to the

IDEA's exhaustion."

B. *Paris School District v. Harter*, 894 F.3d 885 (8th Cir. 2018).

ISSUE: Whether the court properly slashed the parent's first fees request because the due process hearing was too lengthy.

Whether the court properly rejected the parent's second fees request as untimely.

FACTS: A parent prevailed in an administrative hearing and judicial review. As a part of the judicial review, the district court determined that she was the prevailing party. She was then instructed to request attorney fees within fourteen days. The parent requested only fees expended on the administrative hearing; the request was granted in part. After receiving this award, the parent requested fees for the hours spent on the judicial review and in seeking fees. The parent said that she filed her fees requests separately because it was her attorney's practice to bifurcate fees requests.

The court rejected this request as untimely because it was submitted after the 14-day deadline had elapsed.

RULING: "Where attorney fees are appropriate, courts typically use the lodestar method for calculating a reasonable award. The lodestar is calculated by multiplying the number of hours reasonably expended by the reasonable hourly rates. . . . [The parent] is certainly correct that a district court may not arbitrarily reduce the amount of hours on which an award of attorney fees is based. The district court's reduction here, however, was far from arbitrary. . . . The district court's conclusion that [the parent's attorney] billed for unnecessary and excessive work is supported by its extensive knowledge of the details of this case and familiarity with similar litigation. . . . We have no reason to second guess the district court's determination, based on the judge's experience, that the seven days [the parent] took to complete the due process hearing was excessive because the hearing was far less complex than litigation completed in less time." The district court noted that Arkansas has a regulation that states a due process hearing should last no longer than three days.

"We agree with the district court that its order instructing [the parent] to submit her request for attorney fees within fourteen days was not misleading in any respect. The order did not indicate in any way that the fee request should be bifurcated. We reject [the parent's] contention that the district court's instruction to submit briefing as to the amount to be awarded for work done on the IDEA claim was so ambiguous that it demanded a finding of excusable neglect."

C. *Nelson v. Charles City Community School District*, 900 F.3d 587 (8th Cir. 2018)

ISSUE: Whether parents of a non-special education student who does not have an IEP but who is frequently absent were required to exhaust IDEA remedies.

FACTS: A ninth grade student's parents reported when she registered with the Charles City Community School District that the student had polycystic ovarian syndrome and depression. The student was frequently absent due to depression and complications from PCOS. After truancy mediation was initiated, the parents began inquiring about online educational opportunities.

The parents applied to open enroll the student in a school district that ran a particular online program, but their application was denied as untimely. The Charles City Community School District initially refused to support the parents' request to reconsider. After successfully appealing the school board's decision and securing the right to open enroll the student in the online program, the parents were told that they would have to wait until the following school year to enroll. She took certified nursing assistant classes instead and never returned to high school, though she did pursue a GED.

The parents sued the school district under section 504, and the district court dismissed it for failure to exhaust administrative remedies.

RULING: "[T]he IDEA exhaustion requirement is not limited to claims formally brought under the IDEA. It also applies where a plaintiff brings a claim under the Constitution, the Americans with Disabilities Act, the Rehabilitation Act, and other federal laws protecting children with disabilities if such a claim 'seek[s] relief that is also available under' the IDEA."

"The Nelsons pleaded that the Charles City District 'failed to make reasonable accommodations to enable C.N. to receive education free from discrimination based upon her disabilities.' Evaluating the claim as a whole, we think the Nelsons in substance advance a challenge to the denial of a free appropriate public education. . . . In essence, the Nelsons claim that C.N. was denied a FAPE due to the mishandling of her open enrollment application by the Charles City District when its own educational programming could not meet her needs."

the court rejected the parents' argument that pursuing IDEA remedies for a student who had not been identified as being in need of special education would be futile, stating: "Given the Nelsons' position that C.N. was a child with a disability who needed educational accommodations, nothing prevented the Nelsons from filing a complaint and invoking the full panoply of procedural safeguards available under the IDEA."

D. *Parrish v. Bentonville School District*, 896 F.3d 889 (8th Cir. 2018)

ISSUE: Whether moving out of state renders exhaustion of administrative remedies futile.

FACTS: Four autistic students were enrolled in the school district.

Child L was enrolled in the school district from kindergarten until third grade. During third grade his behavior worsened. Despite various efforts from the school district, Child

L exhibited behavioral outbursts ranging from mild disruption to acts of aggression resulting in physical harm to school district employees. He was removed from the school district in 2012.

Child A was enrolled at the school district from kindergarten through second grade. Child A was aggressive at times; when the interventions contained in the IEP proved ineffective school district staff applied CPI holds. In second grade, Child A started arriving late to school and being checked out of school early on a regular basis. He was then withdrawn from the school district.

Child S attended second grade in the school district. He refused to do work or follow directions; this refusal led to physical aggression at least once per day. The school district's crisis plan authorized the district to use physical restraint when Child S presented a danger to himself or others. The school district proposed that he be placed in therapeutic day treatment, the parent moved Student S out of the school district.

Child G attended second grade in the school district. He was placed in a private school and relocated away from the school district when his parents believed he was starting to exhibit fear, anxiety, and school avoidance behaviors.

The parents of Child L and Child A filed hearing requests, and appealed their denial while asserting other federal claims. The parents of Child S and Child G did not exhaust their IDEA procedural rights before leaving the school district.

RULING: With regard to Child L and Child A, the court determined the district court had properly ruled in favor of the school district in the appeal of the due process hearings. It further stated: "The claims under the ADA and the Rehabilitation Act are similarly unsupported. The parents failed to present evidence of bad faith or gross misjudgment sufficient to proceed with their alleged ADA and § 504 violations. . . . [T]he record is devoid of evidence that the District used physical force or seclusion in a manner that denied the children a FAPE. Also, the parents failed to present any evidence that the District treated Child L and Child A differently than other similarly situated children. Under the circumstances presented here, the district court properly granted summary judgment on Child L and Child A's claims.

"Child S's mother did not file an IDEA due process complaint, request a due process hearing, or engage in the exhaustion procedures under the IDEA. Rather, she moved her child out-of-state and then commenced this action. Similarly, Child G's parents did not file an IDEA due process complaint, request a due process hearing, or engage in the exhaustion procedures under the IDEA. They relocated with Child G to another state and then commenced this action. . . . The parents assert that they meet the futility exception [to the administrative exhaustion requirement] because they moved out of state. Their assertion is unsupported by any precedential authority. The district court properly granted summary judgment on Child S and Child G's claims for failure to exhaust their administrative remedies."

ATTORNEY'S FEES

A. *R.M.M. v. Minneapolis Public School District*, 2017 WL 6453302 (D. Minn. Dec. 15, 2017).

ISSUE: Can the parents be considered the prevailing party by winning on a procedural issue (e.g., the right to a due process hearing for a student voluntarily enrolled in a private school).

FACTS: R.M.M. was voluntarily enrolled in private school. Her mother filed an administrative complaint alleging that her resident school district had violated its child-find obligations in failing to identify her and ensure she received a FAPE. The ALJ dismissed the child-find claim, determined the school district had denied R.M.M. a FAPE, and ordered the school district to provide or pay for additional instruction in certain subjects. The parents and the school district appealed. The district court decided the ALJ had jurisdiction over the FAPE claim because Minnesota law guarantees a private school student the right to a FAPE. On appeal, the Eighth Circuit affirmed, reasoning that the student had the right to a FAPE under Minnesota law and a right to a due process hearing on that issue under both state and federal law.

The case was remanded to the ALJ, who held a due process hearing on the child-find claim. He found in favor of the parents and awarded compensatory education, reimbursement for an assessment, and tuition costs.

The parents filed this action requesting attorney fees.

RULING: "[T]he Court agrees with the School District that federal law did not afford substantive relief to R.M.M. on her FAPE claim. And while she prevailed under state law, state law does not provide for attorneys' fees. . . . However, R.M.M. also sought procedural relief under the IDEA as to any FAPE claims arising from kindergarten through January 2014. She requested remand, followed by a due process hearing to address these claims. . . . The Third Circuit recently considered the question of whether an award of procedural relief confers prevailing party status, finding that 'if a parent vindicates a procedural right guaranteed by the IDEA, and if the relief she obtains is not "temporary forward-looking injunctive relief," then she is a "prevailing party" under the IDEA attorneys' fee provision and is eligible for an award of attorneys' fees.' Here R.M.M. obtained a ruling on the merits of her right to procedural relief—which was not temporary, injunctive relief—when this Court remanded her FAPE claim for a due process hearing before the ALJ. This relief altered the legal relationship between the parties by affording R.M.M. her due process rights. Accordingly, R.M.M. is a prevailing party, under federal law, for the portion of her FAPE claim that sought a due process hearing." (citations omitted)

BEHAVIOR AND DISCIPLINE

A. *Doe v. Osseo Area School District*, 296 F.Supp.3d 1090 (D. Minn. 2017).

ISSUE: What is the proper standard to be used for conducting a Section 504 "manifestation determination?"

Is a school district required to conduct Section 504 "reevaluation" before expelling the student?

FACTS: A high school student wrote racist graffiti messages using whiteout in a bathroom located in his high school. After an investigation, the school district discovered he had written the graffiti and initiated expulsion proceedings against him.

The student had a section 504 plan in place to address his needs due to ADHD and PTSD. Before the expulsion hearing, the student's section 504 team held a manifestation determination meeting. The purpose of the meeting was to determine whether the graffiti incident was caused by the student's disabilities. At the meeting, the team reviewed the substance of the incident, the student's section 504 plan, a diagnostic report from a therapist, the student's academic performance, classroom observations, graduation requirements, and his background before enrollment at the school. The school personnel determined that the student's section 504 disabilities did not cause him to write the racist graffiti in the bathroom. Thereafter, an expulsion hearing was held and the student was expelled.

His parents then brought an action in federal court alleging that the school district violated section 504 by expelling the student without first conducting a reevaluation and by applying "an unlawfully high standard" in the manifestation determination. Both the parents and the students moved for summary judgment.

RULING: "School discipline cases support the 'caused by' standard applied by the School District. Further, the OCR has long utilized a causation standard that aligns with this standard."

"[A]biding by IDEA procedures is one approved method for complying with the requirements of Section 504. Under the IDEA, if a student who receives services violates a code of student conduct, and the subsequent disciplinary change in placement would exceed 10 consecutive school days, the school may discipline the student in the same manner as a non-services receiving student 'if the behavior that gave rise to the violation of the school code is determined not to be a manifestation of the child's disability.' . . . In this case, the School District concluded that Minor Doe's vandalism in writing racist graffiti was not caused by his disability. . . . [O]nce this determination was made, the School District was not required to complete a Section 504 evaluation prior to expelling Minor Doe."

B. *Olu-Cole v. E.L. Haynes Public Charter School*, 292 F. Supp. 3d 413 (D. D.C. 2018).

ISSUE: Can a school continue to exclude from his in-school placement after a 45-day IAES expires?

FACTS: A 17 year old student who was classified as having an emotional disturbance attacked another student in school resulting in a concussion. The student was placed in a 45 day interim alternative educational setting (IAES) which consisted of home tutoring. When the 45 day period ended the student attempted to return to the Charter School which refused to admit him. The parent initiated an expedited due process hearing seeking to change the student's assignment to another school in the district. Since then the student remained at home. The parent filed a Motion for a Preliminary Injunction in Court seeking an order to return the student to the charter school during the pendency of the expedited hearing process.

RULING: The Court first addressed the provision in the IDEA which states that the student shall remain in the IAES until the expiration of the 45 day period or the decision of the hearing officer whichever occurs first. (*See* 34 C.F.R. § 300.533). Although a school can ask the hearing officer to extend the IAES if it proves that returning the student is "substantially likely to result in injury" the school did not do so in this case. It was under the mistaken belief that the school could extend the IAES on its own. However, the Court concluded that the so-called "stay put" presumption can be overcome if a school can demonstrate a different result is warranted.

The Court refused to order the charter school to reenroll the student since the Court found the student would not suffer irreparable harm since the hearing decision was expected within 10 days. In addition, the Court found that the public interest and potential injury to others favored the school's position since there had been a history of multiple violent incidents with other students and staff.

C. *A.V. v. Panama-Buena Vista Union Sch. Dist.,* 71 IDELR 107 (E.D. Cal. 2018).

ISSUE: Does the "deemed to have knowledge" procedural protections of the IDEA apply if the parent refuses to consent to conduct a special education evaluation?

FACTS: A student enrolled in a new school district. The parent provided the new school with a Section 504 plan and behavior support plan developed by the student's previous school. The new school scheduled a 504 meeting to review the plan.

The parent requested a special education evaluation three days before the meeting based on several behavioral incidents the student had engaged in. The school agreed to conduct the special education evaluation at the 504 meeting. The parent was provided with written notice of the proposed evaluations and a request to consent both in English and Spanish since she primarily spoke Spanish.

Meanwhile, the parent filed an expedited due process hearing request alleging that the

school failed to conduct a manifestation determination before suspending the student for more than 10 school days. The parent contended that the student was protected by the IDEA even though the student had not yet been deemed eligible for special education since the school had a “basis of knowledge” suspecting a disability.

After several attempts to acquire consent, the parent consented to the evaluations 4 months later (which happened to be the first day of the expedited due process hearing).

RULING: The court held that the parent's failure to consent to an assessment prevented the student from claiming the protections of the IDEA. The court observed that the district prepared copies of its assessment plan in both English and Spanish and mailed them to the parent's home address on at least four occasions. Furthermore, district personnel provided the parent with a Spanish-language version of the consent form, reviewed the form with her, and explained why the district needed to conduct an evaluation. The judge rejected the parent's claim that the district never provided the consent form in a means accessible to her. "The district was required only to make reasonable efforts to obtain the necessary consent from [the parent], and the facts and the testimony presented demonstrate that the district went the extra mile, and then some, to do so, all to no avail."

The court recognized that the parent ultimately returned the signed consent form in January 2015. However, in light of the parent's earlier failure to consent, the district had no obligation to conduct a MD before it expelled the student in November 2014.

D. *Letter to Mason,* 72 IDELR 192 (OSEP 2018).

ISSUE: Can administratively shortened school days result in a disciplinary change in placement?

RULING: In general, OSEP does not consider the use of exclusionary disciplinary measures to be disciplinary removals from the current placement for purposes of 34 CFR § 300.530, so long as children with disabilities are:

- Afforded the opportunity to continue to be involved in and make progress in the general education curriculum;

- Receive the instruction and services specified on their IEPs; and

- Participate with nondisabled children to the extent they would have in their current placement.

The use of short-term disciplinary measures under the circumstances escribed, *if implemented repeatedly*), could constitute a disciplinary removal from the current placement, and thus the discipline procedures set out in 34 C.F.R. §§ 300.530-300.536 would apply.

NOTE: *See* Minn. Stat. 121A.41, subd. 10 (The definition of "suspension" "does not apply to dismissal from school for one school day or less, except as provided in federal law for a student with a disability.")

BULLYING/ HARASSMENT/RETALIATION

A. *Bowe v. Eau Claire Area Sch. Dist.*, 71 IDELR 168 (W.D. Wis. 2018).

ISSUE: Is a school district liable under Section 504, the ADA and Title IX by engaging in remedial measures that did not actually stop the bullying?

FACTS: The student, who had Asperger's Syndrome, was the victim of bullying in middle and high school. The bullying included name calling and other offensive behaviors. During the student's tenure in the school district, the student and his parents complained of more than 30 discrete acts of bullying. School officials investigated each complaint, which generally involved interviewing the students and sometimes the investigation included referring the matter to the police or speaking to the classroom teacher. If the investigation uncovered "inappropriate action," school officials would respond with calls home or corrective action plans. The "corrective action" ranged from "counseling" the student, to suspension, and in some cases referral for criminal charges. The student acknowledged that he precipitated conflict as well, which included name and threatening physical violence against those who were reportedly bullying him. The parents conceded that the school district investigated every instance of bullying that the student or his parents brought to their attention and addressed confirmed acts of bullying with some sort of corrective action. Nevertheless, parents claimed that school officials' response to the bullying was clearly unreasonable because they "failed to protect [the Student] from harassment." The parents argued that liability is assigned whenever a school does not "make a reasonable effort to remedy the harassment."

RULING: The court stated that those "students who bullied [the Student] should be ashamed, and the District cannot be particularly proud of its response to the problem. But the question before the court is not whether the defendants could have done more to prevent [the Student]'s suffering, but whether they were deliberately indifferent to it. Defendants did not ignore any of Connor's complaints, and no reasonable juror could find that defendants' response to the bullying was clearly unreasonable. The court will enter summary judgment in defendants' favor."

B. *J.M. v. Matayoshi*, 72 IDELR 145 (9th Cir. 2018)(unpublished).

ISSUE: Does the IEP of a student need to include all recommended approaches to addressing bullying recommended by the Office of Civil Rights ("OCR") in order to provide the student a FAPE?

FACTS: A special education student was subjected to bullying at school. The IEP team subsequently revised the IEP to include a full time one to one paraprofessional and

a “crisis plan” that included a protocol that could be utilized in the event bullying occurred. The parents insisted that the IEP was deficient because it did not incorporate *all* of OCR’s suggested approaches.

RULING: The plaintiffs have not shown that, under the terms of the 2014 IEP, the student would be unable "to make progress appropriate in light of [his] circumstances." The plan contains many, if not all, of the suggestions to combat bullying set forth in a "Dear Colleague" letter issued in 2014 by the U.S. Department of Education, Office for Civil Rights. *See Dear Colleague Letter: Responding to Bullying of Students with Disabilities* (October 21, 2014).

“We decline plaintiffs' suggestion "to take the further step and give the USDOE policy guidance on bullying ... the force of law" by adopting "it as a minimum standard when a public school agency develops an IEP" for disabled children who are bullied. The IDEA expressly provides that informal guidance letters are "not legally binding," 20 U.S.C. § 1406(e), and that the Secretary "may not issue policy letters ... that ... establish a rule that is required for compliance with ... this chapter without following the" rule-making requirements of the Administrative Procedure Act, *id.* at § 1406(d).”

C. *Lagervall v. Missoula Cty. Pub. Schs.*, 71 IDELR 40 (D. Mont. 2017).

ISSUE: Does a requirement that an “aggressive and disruptive” parent contact the principal and obtain permission before coming to school constitute unlawful retaliation?

FACTS: While Lagervall's son, was a student at Sentinel High School, Lagervall engaged in a pattern of recurring conduct in his interactions with Sentinel staff members., Lagervall would become agitated, upset and would terminate the phone conversation. Typically, after a terminated phone call he would arrive at Sentinel "in an escalated, dysregulated state, demanding information, responses to questions, and disrupting school operations."

The building principal later prepared and delivered a letter to Lagervall. The letter instructed Lagervall that in the future, if he wanted to come to Sentinel he had to first notify the principal and obtain permission to come to the school. The letter noted that the required permission was due to Lagervall's prior conduct towards school officials which they perceived to be "aggressive and disruptive." At no time was the Lagervall denied permission to come to school.

HOLDING: The court held that no violation of the ADA arose since there was no evidence that the procedure excluded the parent from participating in the school’s programs and activities. Furthermore, the procedure was reasonable in light of the parent’s “intimidating, aggressive, disruptive and angry behavior.”

CHILD FIND

A. *Panama-Buena Vista Union Sch. Dist. v. A.V.,* 71 IDELR 57 (E.D. Cal. 2017).

ISSUE: Exactly when is a school district's child-find obligation triggered?

FACTS: The parent enrolled her child in the school district and provided the District with a copy of the student's most recent Section 504 plan along with a behavior support plan from the student's previous school district The Section 504 and behavioral support plans were apparently developed given the student's medical diagnosis of Attention Deficit Hyperactivity Disorder ("ADHD").

Following a series of disciplinary incidents, schools officials met with the parent. At that time, the district believed that the student's behaviors could be addressed through accommodations in his Section 504 plan, and Plaintiff's mother consented to the district's proposals in that regard. In addition, the District presented and explained a general education behavior contract which the parent and the student signed and understood. The parent did not indicate at this time that her son had any disability that would interfere with his ability to comply with the contract. There is also no indication that she asked for a referral for special education at that time. After further behavior incidents, the parent requested a special education evaluation.

Between August 21, 2015 and October 6, 2015, the student was suspended a total of six school days. Despite numerous efforts on the District's part to obtain parent consent to special education assessment, she did not sign the consent form until January 6, 2015, nearly four months after the District initially requested it.

The hearing officer held that the school district's obligation to evaluate the student was triggered *as of the first day of school* for two primary reasons: (1) the parent had told District personnel that the student had previously been expelled from his previous school district for very aggressive and inappropriate behavior; and (2) the student had a Section 504 plan.

RULING: By finding that the district had a child-find obligation with regard to the student beginning on August 18, 2014, the hearing officer determined that that obligation commenced the very first day of school, despite the fact that district staff had not yet had any opportunity whatsoever to observe the student's behavior, and had not yet even received his prior academic records. That finding, in essence, deprived the district of any right to implement general education interventions on its own. Also, requiring the school district to make a decision as to special education eligibility at the onset of a student's enrollment could interfere with its concurrent obligation to educate disabled children in the so-called "least restrictive environment."

"The Court agrees that the hearing officer committed error when she decided that the District's child-find obligation was triggered on August 18, 2014. The District was entitled, and even required, to make its own determination as to A.V.'s suspected disability once he enrolled as a student. The fact that A.V.'s previous district … had developed a Section 504 plan does not equate with a finding that A.V. needed special education."

ELIGIBILITY

A. *Durbrow v. Cobb County Sch. Dist.*, 887 F.3d 1182 (11th Cir. 2018).

ISSUE: Is a student with ADHD diagnosis and a Section 504 plan who excelled in rigorous academic programs, but who also experienced a significant academic downturn, eligible for special education?

RULING: The 11th Circuit ruled that the student was not a "child with a disability" under the IDEA. To qualify for IDEA services, the student needed to show that his ADHD had an adverse effect on his academic performance and that he needed special education as a result. A "need" for special education was not established.

The student met or exceeded academic expectations during his first three years of high school. Not only was he selected for his school's rigorous magnet program based on his achievements in math and science, but he earned straight A's in his honors and Advanced Placement courses and achieved high scores on his college entrance exams. More importantly, the student's teachers did not believe he needed special education. Several of those teachers testified that the student's ADHD did not impede his learning, and that he was able to make progress when he put forth sufficient effort.

The court further noted that, although the student received failing grades due to incomplete work, the work the student completed in his senior year showed he was able to absorb material and maintain focus. Teacher testimony revealed that the student's low grades stemmed from his failure to complete homework or take advantage of the accommodations in his Section 504 plan.

OPEN ENROLLMENT – TRANSPORTATION

Osseo Area Schools v. M.N.B., 2018 WL 4603279 (D. Minn. Sept. 25, 2018)

ISSUE: Whether a school district's admission of an open-enrolled special education student who had special transportation written into the IEP as a related service rendered it responsible for providing the student with portal-to-portal transportation

FACTS: An eleven-year-old special education student living in the Big Lake School District has an IEP that requires individual transportation to and from school. While the student attended an out-of-district school, her parents drove her to and from school, and the Big Lake School District reimbursed them for mileage. In 2016, the parents applied for open enrollment in the Osseo School District. Osseo accepted the application, and the parents and Osseo agreed that the student would attend a school located in a different school district. The parents told Osseo that the student required individualized transportation to and from school. While Osseo did not disagree, it agreed to reimburse

the parents only for mileage between Osseo's boundary and the school the student attended. It would not pay for mileage for the full trip between their home and the school.

After the parties litigated due process hearing complaints over the reimbursement issue, the ALJ ruled in favor of the student, stating that "while [she] remains open enrolled in the District, the District is responsible for [her] FAPE and therefore for implementation of the . . . IEP, [which] requires [her] to be transported by the Parents and that they receive reimbursement for mileage from the District." Osseo challenged this ruling in federal court.

RULING: "[U]nder the circumstances presented, the District is 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 individualized transportation is a 'related service' necessary to ensure that she receives a FAPE. Because the District is responsible for providing [the student] with a FAPE, it is necessarily responsible for providing her with specialized transportation as stated in her IEP. The fact that [her parents] made the decision to open enroll [the student] in the District does not undermine this conclusion or alter what M.N.B. requires in order to receive a FAPE."

"M.N.B. submitted an open enrollment application in the District, as permitted under Minnesota law. Once the District accepted her application, M.N.B. became a student of the District rather than a student in her home district of Big Lake. The District thereafter became solely responsible for providing M.N.B. with a FAPE."

A district cannot reject an "IEP provision requiring specialized transportation based solely on the fact that [the student] open enrolled in the District."

INDEPENDENT EDUCATIONAL EVALUATION

A. *Academy for Sciences and Agriculture Independent School District 4074*, OAH 8-1300-34944, 118 LRP 15757 (ALJ Lipman 2018).

ISSUE: Whether a school district is entitled to conduct a reevaluation before being required to pay for an IEE.

FACTS: Nearly two years after the most recent evaluation of a student was conducted in 2015, the parents asserted that the evaluation was outdated and no longer reflected the student's disabilities and needs. The school agreed, because the student's medical and academic changes had changed since the last evaluation. The school formally requested to reevaluate the student, but the parents wanted an IEE at public expense. The parents declined to participate in reevaluation planning conversations.

The parents filed a due process hearing request, arguing that the school had failed to either provide an IEE at public expense or file a due process hearing request to defend

the old evaluation of the student. The school filed a motion for summary disposition, arguing that it was entitled to conduct a reevaluation.

RULING: "A Parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency…. The dispute in this case pivots on the meaning of the phrase 'evaluation obtained by the public agency,' in 34 C.F.R. § 300.502(b)(1) (2017). The Student maintains that 'the evaluation obtained by the public agency' in this case was the 2015 evaluation. . . . The underlying, but unstated premise of the Student's legal theory is that an evaluation must last a minimum of three years—the length of time between the required triennial evaluations. If circumstances change over the course of that three-year period, this argument continues, the School District must choose between defending an evaluation that was not prescient enough to forecast all of the needs that would arise in the future or underwrite an IEE at public expense. This is not our law."

"[The IDEA] provides that student reevaluations will not occur more frequently than once a year, or less frequently than every three years, unless the parent agrees. Congress could just have easily barred the reevaluation of students more frequently than every three years . . . . But neither the statute nor the later regulations are structured in this way."

"[T]he claim that students will be subject to an endless series of evaluations if the School District is permitted to obtain current data in this case is not well taken. The suggestion that school districts will prefer the expense of serial evaluations and reevaluations to any single IEE is very doubtful."

"[A] school district must have a fair opportunity to obtain an evaluation that it believes accurately represents the student's current capabilities and needs. Only after the school district has the opportunity to obtain such an evaluation does a parent have a right to object to those conclusions and obtain an IEE to critically assess the district's reasoning."

* This decision has been appealed to U.S. District Court.

B. *E.P. v. Howard County Pub. Sch. System,* 72 IDELR 114 (4th Cir. 2018)

ISSUE: Does a school district's failure to administer certain subtests requested by the parents, and their failure to interview the student, render an evaluation inappropriate such that the parents are entitled to an IEE?
FACTS: The parents requested an IEE based upon the IEP Team's determination that the student was not eligible for special education. The school district initiated a due process hearing when it refused to pay for the IEE.

RULING: The school district's evaluation was appropriate and comprehensive and administered by qualified individuals. The fact that school evaluators did not complete

certain subtests of the WISC nor complete full observations of the student did not render the evaluation inappropriate.

"In challenging an evaluation, courts have found that a parent 'cannot simply argue that the evaluation was inappropriate because they disagree with its findings.'"…. Rather, "[w]hen challenging an educational evaluation, the pivotal question is whether the District's methods employed were adequate." Plaintiffs do not explain what specific analysis or additional testing was necessary. The request for the IEE is denied.

LEAST RESTRICTIVE ENVIRONMENT

A. *In re: Student with a Disability*, OAH 82-1300-35045, 118 LRP 28736 (ALJ Case 2018).

ISSUE: Whether the school district proved that the student required a more restrictive environment.

FACTS: A special education student attending the school district and receiving education largely in a small group setting was exhibiting behavior at school that was disruptive to the school community and to himself. Despite his many supports, he was not making adequate academic or behavioral progress. As a result of the school district's failure to see the student making progress on his IEP goals, the school district proposed to increase his special education services and decrease his time with his peers by placing him in a different program. The parent verbally rejected this proposal, and the school district filed a due process hearing request.

RULING: "A district may move a child to a more restrictive environment only after it has made reasonable efforts to maintain the student in a more inclusive setting. Generally, there are two grounds for moving a child to a more restrictive setting. A district may move a student if the student is dangerous to or disrupting the school community even after the district has taken every reasonable step to alter the child's behavior. A district may also place a student in a more restrictive setting if it is necessary for the child to receive a FAPE. "

"The School District has proven that it has both grounds for moving student to its proposed setting . . . . Despite the program's behavioral and academic reinforcement strategies, individualized consideration of Student's needs, and the application of numerous pedagogical and behavioral techniques, staff have been unable to help Student improve behaviorally or academically. Because he has shown no improvement on his academic or behavioral goals, the School District is taking the appropriate step of changing Student's placement."

"His current program . . . provides Student with an intense staff-to-student ratio that never exceeds five students per staff . . . . The School District has shown that Student requires a less inclusive setting because his behaviors impede his own learning. . . . Student has made no academic progress this year. . . . Student gave his best academic performance of the school year while in [an] extremely structured [completely segregated

setting with one-to-one instruction]."

"The proposed IEP is reasonably calculated to enable the student to make progress appropriate in light of his circumstances."

DUE PROCESS HEARING PROCEDURES

A. *Indep. Sch. Dist. No. 720 v. C.L.*, 2018 WL 2108205 (D. Minn. May 7, 2018).

ISSUE: Whether an attorney scheduling conflict is good cause to extend of the 45-day due process hearing deadline.

FACTS: A school district requested a due process hearing to defend its evaluation after the parents of a student requested an IEE. The hearing officer scheduled the hearing for Monday April 16 and Friday April 20, despite the fact that the school district had another due process hearing scheduled for April 17-19. The hearing officer rejected the school district's request for an extension of the 45-day hearing timeline, determining that the scheduling conflict was not good cause for extension.

The school district filed a notice of voluntary dismissal under Minn. R. Civ. P. 41.01(a) and indicated it would refile the complaint at a later date. The hearing officer construed a second due process hearing request filed by the parents as an "answer" to the school district's request, and determined that voluntary dismissal under Minn. R. Civ. P. 41.01(a) was therefore unavailable. The hearing officer then found the dismissal request in itself constituted unnecessary delay, and ordered the school district to provide the parents with an IEE at public expense in lieu of proceeding to a hearing.

The school district appealed to federal court and requested a preliminary injunction.

RULING: "The District fails to show that it has a strong likelihood of success on the merits, in part because the merits are governed by a deferential abuse of discretion standard. . . . the Court must consider whether the District has made a strong showing that the ALJ abused his discretion by denying an extension and dismissing the complaint with prejudice. The District's request to extend the 45-day hearing timeline was committed to the ALJ's discretion."

"The mere fact that the ALJ could have considered the District's scheduling conflicts to be good cause for an extension of the hearing timeline does not mean that the ALJ abused his discretion by declining to do so. Scheduling conflicts do not necessarily qualify as good cause for extension of a deadline; judges expect attorneys to be able to work around scheduling difficulties, or to delegate matters to other counsel, so that litigation can proceed uninhibited. . . . The ALJ correctly observed that the District was aware of the 45-day timeline when it filed the due process hearing complaint, and that the District's two due process hearings did not actually overlap. In light of the ALJ's obligation to ensure the timely resolution of due process hearings, the District has not established a strong likelihood of success on the merits for this issue."

"The Court agrees with the ALJ that Parents had answered the District's due process complaint when the District attempted to invoke Minn. R. Civ. P. 41.01(a). Parents' counsel explicitly informed the District's counsel that the 'Complaint and Request for

Hearing III' constituted Parents' response to the District's due process complaint."

The court noted that the hearing officer found problematic "the impending delay from the District's stated plan to refile the due process complaint at a later date. This delay, as the ALJ had already found, lacked good cause. The ALJ was reasonably concerned with moving the process forward rather than permitting the District to withdraw its complaint without prejudice 'when Parents are waiting for a response to their request.' The ALJ's dismissal was not so clearly an abuse of discretion as to allow the District to meet its requisite strong showing of likely success on the merits."

B. *In re: Student with a Disability*, OAH 5-1300-35369, 118 LRP 39004 (ALJ Mortenson 2018)

ISSUE: Whether a hearing officer has the authority under Minnesota law to order the implementation of an initial IEP over the objection of the parents.

FACTS: The school district filed a due process complaint because it wanted to implement an IEP for the student over the students' parents' objection. The school district believed that the student requires special education and related services to receive a FAPE, but the parents refused to consent to IEP proposals.

RULING: "Federal law prohibits an education agency from using the due process procedures under the [IDEA] in order to obtain consent for the initial provision of special education services under the IDEA. Minnesota law does not explicitly permit such a procedure." The school district argued that Minnesota law "implies that a school district may use a due process hearing to obtain consent to implement an initial IEP over a parent's objection."

"[F]ederal law specifically aims to prevent education agencies from overriding parental refusal to consent for initial services using the due process procedures under the IDEA. . . . . Given the lack of state law specifically addressing this topic, which federal law explicitly addresses, it must be concluded that federal law controls. The School District lacks the right, under federal law, to proceed to hearing over Parents' refusal to consent to the initial proposed IEP for Student."

C. *Letter to Fletcher*, 72 IDELR 275 (OSEP Aug. 23, 2018)

ISSUE: How should expedited due process hearings be scheduled when there are fewer than 20 school days remaining in the school year at the time of the request?

RULING: "While it would be consistent with IDEA for an expedited due process hearing to occur within less than 20 school days from the date that the due process complaint was filed, there is no IDEA requirement that the hearing occur within less than 20 school days."

"Given the tight timeline constraints for expedited due process hearings, the SEA or LEA must ensure that the hearing is completed no later than the 20th school day from when the expedited due process complaint is filed and that the hearing officer's determination is made no later than the 10th school day after the hearing concludes—

even if the complaint was filed during the previous school year or during the summer, and the due date falls during the following school year."

INDIVIDUAL LIABILITY FOR ALLEGED SPECIAL EDUCATION VIOLATIONS

Crofts v. Issaquah Sch. Dist. 72 IDELR 15 (W.D. Wash. 2018).

ISSUE: Can school district employees be joined as individual defendants in a special education case?

FACTS: Parents commenced a lawsuit seeking tuition reimbursement and relief for an alleged failure to provide compensatory education to a special education student. The parents later moved to amend their IDEA complaint to add the principal, director of special education, and school psychologist as parties to their case.

RULING: "Given the language and the intent of the IDEA and the lack of available remedies against individual school district employees or officials, the Court finds that redress for alleged violations of the IDEA is more appropriately pursued against Defendant Issaquah School District, and not individual defendants in their individual capacities. Therefore, Plaintiffs' Motion to Amend is DENIED."