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FROM THE SCHOOLHOUSE TO THE COURTHOUSE:

Special Education Cases, Guidance, Legislation and Other Developments

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TRANSPORTATION – OPEN ENROLLMENT

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."

SETTLEMENT AGREEMENTS - EXHAUSTION OF ADMINISTRATIVE REMEDIES

Albright v. Mountain Home Sch. Dist., 926 F.3d 942 (8th Cir. 2019).

ISSUE: Does resolving a due process hearing request with a settlement agreement constitute exhaustion of administrative remedies?

FACTS: The parent of a student eligible for IDEA services requested a due process hearing, alleging that a school district had denied her child a FAPE between November 15, 2013, and October 17, 2014. After the hearing officer determined the student had not been denied a FAPE, the parent challenged the hearing officer's decision in federal court.

However, in addition to challenging the hearing officer's decision, the parent added several federal and state claims. The federal district court granted the school district's motion for summary judgment on these claims because the claims relied mainly on allegations that arose outside of the relevant time period. Notably, some of these allegations were the subject of two previous due process hearing requests that had been

resolved by entering settlement agreements. The court determined that the parent failed to exhaust administrative remedies, as required by the IDEA. The parent appealed.

DECISION: No. The IDEA requires that if a party files a civil action seeking relief that is also available under the IDEA, the party must first administratively exhaust the claims. The Eighth Circuit noted that it had "not heretofore decided whether settlement constitutes exhaustion under the IDEA," and reviewed the question *de novo*. It then reasoned that because an action in federal court may only be brought after a final decision made in a hearing, exhaustion of administrative remedies "requires the entry of administrative findings and a decision." Accordingly, "[a] pre-decision settlement . . . fails to satisfy the IDEA's requirements." The court rejected the parent's argument that this reading is not consistent with Congress's intent to encourage settlement, because "the terms of the statute are clear and unambiguous."

RESTRAINT AND SECLUSION

Parrish v. Bentonville Sch. Dist., 72 IDELR 141 (8th Cir. 2018).

The court of appeals affirmed the district court's decision that the school district did not violate the IDEA, Section 504, the ADA or constitutional right to bodily integrity when using physical restraint when removing two unrelated students with autism from their classrooms. Both students had an IEP and a behavioral intervention plan that included detailed strategies for addressing their behavioral issues, one of which permitted removal to another room when all interventions were unsuccessful. Although the parents objected to the use of physical restraint during those removals, the children's aggressive behavior justified its use. While the district's strategies may have been "imperfect," they complied with the IDEA and did not deny FAPE. In addition, the children made academic progress while attending the school district's schools, and the parents failed to show that the school district acted with bad faith or gross misjudgment.

ELIGIBILITY FOR SPECIAL EDUCATION; EVALUATION PROCEDURES

A. *Lisa M. v Leander Indep. Sch. Dist.*, 924 F.3d 205 (5th Cir. 2019).

When the student was in second grade, he experienced challenges with writing and classroom behavior. The district provided accommodations through Section 504. By April of second grade, the student had been diagnosed with Attention Deficit Hyperactivity Disorder ("ADHD") and Developmental Coordination Disorder ("DCD"). For the following year and a half, the parents did not request services beyond Section 504. However, shortly before the start of the student's fourth grade year, in August 2015, parents requested that the student be evaluated for possible special education eligibility. The school district refused on the basis that the Section 504 accommodations were sufficiently addressing the student's needs. One month later, a private neuropsychologist recommended that the student be considered for special education and diagnosed him

with a Specific Learning Disability ("SLD") with impairment in written expression. After that, the school district agreed to evaluate him.

The school district found the student eligible for special education. The IEP Team proceeded to develop an IEP. The parents disagreed with the proposed IEP and requested another IEP team meeting. At the second IEP meeting the parents were informed that the student actually was not eligible since the student did not need special education.

In finding the student eligible, the court of appeals concluded that school district personnel, including the school district's attorney, intervened at some level with the teachers who made the original decision, and appeared to work to reverse the initial eligibility determination.

B. *Independent. Sch. Dist. No. 283 v. E.M.D.H.,* 357 F.3d 876 (D. Minn. 2019)

ISSUES: Is the student eligible for special education? Did the school district violate its child-find obligation? Was the order for prospective private services supported by the record?

FACTS: Over the course of two and a half school years, a student became increasingly absent from school and eventually stopped attending entirely. She was diagnosed with ADHD and general anxiety disorder, among other diagnoses. Her parents requested a special education evaluation and a due process hearing. The school district found the student not eligible for special education because her disability had not manifested in the classroom (as required for emotional-behavioral disturbance eligibility) or adversely affected her ability to complete educational tasks within routine timelines (as required for other health disability eligibility). After a lengthy hearing, the hearing officer found the student eligible for special education, determined the school district had failed to timely identify and evaluate her, and ordered prospective private services. The school district challenged this decision in federal court.

DECISION: The court determined that the student is eligible under both emotional-behavioral disturbance and other-health disability. It did not address the fact that the student's disability does not manifest in the classroom or the fact that her disability has not affected her ability to complete educational tasks within routine timelines in any other way than causing her to be absent. The court simply reasoned that the Student's mental health issues directly impacted her school attendance, which in turn "inhibited her progress in the general curriculum." On this basis, the court found the student is eligible for special education.

The court also found that the school district violated its child-find obligation under the IDEA because the school district was aware that the student had stopped attending school due to her anxiety. The court noted that the school had communicated regularly with the parents during this time, but this involvement should have prompted the school district to identify the student as potentially eligible for special education. The court did not apply the two-year statute of limitations because the school district did not provide the parents a

copy of a procedural safeguards notice when it had discussed special education with them in the past, thereby denying them the knowledge necessary to request a due process hearing.

The district court reversed the hearing officer's award of prospective services, however, noting that the hearing officer failed to conclude that the school district was not capable of providing the necessary services. The court noted that the record contained "scant evidence" concerning whether the school district could provide the student with a free appropriate public education in the future. Accordingly, it determined that the record did not support the award of private services and reversed that award. The school district has appealed this decision to the Eighth Circuit.

C. *Letter to Mills*, 74 IDELR 205 (OSEP 2019).

Does a school district violate PWN requirements by failing to either agree to conduct the assessment requested by a parent or guardian, or to deny that assessment, when it proposes to conduct a "screening" in the same area of suspected disability by different personnel? OSEP stated: There is nothing in IDEA that would prohibit a State educational agency (SEA) or LEA from implementing screening procedures to determine if a child is suspected of having a disability. The use of screening procedures, however, may not be used to delay or deny an evaluation for special education and related services.

Does a school district violate PWN requirements by failing to either agree to conduct the specific assessment by the specific personnel requested by the parent, or to deny that specific assessment by the specific personnel in writing? OSEP said that nothing in the IDEA's PWN requirements mandates that the specific personnel completing the evaluation be included in the prior written notice.

INDEPENDENT EDUCATIONAL EVALUATIONS

A. *N.D.S. v. Academy for Science and Agriculture Charter*, No. 18-CV-0711, 2018 WL 6201725 (D. Minn. 2018).

ISSUES: Was the parents' request for a due process hearing untimely? If the request was timely, what relief are the parents entitled to?

FACTS: In December 2015, a school conducted a triennial reevaluation of a student with a disability and provided her parents with a copy of the evaluation report. Her parents did not express any disagreement. In June 2017, the student's symptoms changed and her learning difficulties worsened after she suffered a concussion. Her parents then contacted the school and stated that the December 2015 reevaluation was inadequate. The school agreed that the December 2015 reevaluation was no longer current and sought permission to reevaluate the student. The parents refused to consent to the reevaluation

and insisted that the school pay for an independent educational evaluation ("IEE"). When the school refused, the parents filed a due process hearing request on December 29, 2017.

The hearing officer determined that the parents' objection to the 2015 reevaluation was untimely and that they were not entitled to an IEE.

The parents challenged this decision in federal court.

DECISION: The district court first addressed the timeliness issue. It noted that the IDEA has a two-year statute of limitations which begins to accrue not when the alleged wrongful act occurred, but when the parents "knew or should have known about the alleged action that forms the basis of the complaint." The district court noted that here, the accrual date was the date on which the parents "knew or should have known" that the December 2015 reevaluation was inaccurate. Specifically, the court noted that in order to be entitled to an IEE, the parents necessarily assert that the December 2015 IEE was *never* accurate. The court determined there was not sufficient evidence in the record to determine (1) the reason 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 these inadequacies, and (3) whether their December 29, 2017, due process complaint was therefore timely. It remanded the case to the hearing officer with instruction to make these findings.

The court then stated that if, on remand, the hearing officer found the due process hearing request was not time-barred, it must order the school to either file a hearing request to show its 2015 reevaluation was proper or provide an IEE at public expense. The court decided that because the request for an IEE was made so long after the evaluation was completed, it should determine before remanding what the *subject* of the IEE or hearing sought by the parents would be.

The purpose of an IEE is to assist parents in determining whether they agree or disagree with a school district evaluation. Because allowing the parents to secure an IEE on the topic of the student's needs as of December 2017 would "substantially undermine the reevaluation process established by the IDEA," the court held that any hearing or IEE ordered on remand "must focus on whether the December 2015 reevaluation was appropriate at the time it was completed." The court acknowledged that in this particular case, "such a hearing or IEE would be a waste of time, as everyone recognizes that [the student's] condition has changed and the December 2015 reevaluation is obsolete." The court reasoned that the parents likely "expressed disagreement with the December 2015 reevaluation not because they really cared about whether it was accurate, but because they had been advised that expressing such disagreement would give them a right to a publicly funded IEE focused on [the student's] current condition." The court indicated that going forward, "parents will object to the accuracy of an evaluation only when the objection is sincere and there is something at stake, and hearings and IEEs regarding the accuracy of evaluations will be worthwhile."

B. *D.S. v. Trumbull Bd. of Educ.*, 357 F. Supp. 3d 166 (D. Conn. 2019).

The student underwent a triennial evaluation in October 2014. In March 2016 and again in March 2017, the school district also conducted Functional Behavioral Assessments ("FBA") to identify the triggers for troublesome behavior by the student, including punching, kicking, and hitting of property.

At a meeting with the parents in March 2017, the school proposed -- and the parents agreed to -- a plan for another triennial reevaluation to take place in October 2017. Two months later the parents requested another meeting in May 2017, and they then requested an IEE for more testing across a broad range of areas to include the following assessments:

1. A comprehensive functional behavioral assessment by a Board Certified Behavioral Analyst ("BCBA") who would also develop an appropriate behavioral intervention plan ("BIP");
2. A comprehensive psychoeducational assessment (including the BASC) by an evaluator trained in concussions and other brain injuries and is otherwise qualified to address possible cognitive impairment of the Student as a result of his head banging;
3. A comprehensive occupational therapy assessment;
4. A comprehensive speech & language assessment;
5. A comprehensive physical therapy assessment;
6. A comprehensive central auditory processing disorder assessment; and
7. A comprehensive assistive technology assessment.

The school district initially denied all of the parents' IEE requests. Instead, it proposed adding additional areas and assessments to its own upcoming triennial evaluation of the student that was scheduled for October 2017, including for central auditory processing, autism diagnostic observation, fine motor, gross motor, and assistive technology assessments. The parents, however, refused to consent to the school's undertaking these additional tests, despite their apparent desire for the student to be evaluated in all these areas.

The right to an IEE must be premised upon an actual disagreement with an evaluation that the school district has conducted. Thus, there must be a "connection between the evaluation with which the parents disagree and the independent evaluation they demand."

The court stated: "Thus, for example, if the school district conducts an assessment to measure a student's eyesight (and assuming arguendo that this limited testing constitutes an "evaluation" for purposes of the IDEA), a parent may "disagree" with the test results and request an independent eye exam at public expense. The parent, however, may not use the occasion of the school's decision to conduct an eye exam to demand that the public pay for a panoply of neurological, occupational, and behavioral evaluations by independent specialists."

Here, the additional assessments that the parents sought went beyond what the district's FBA measured. If parents were to have such "freeranging" rights to impose financial obligations on schools every time that a school district conducts a limited assessment...then schools would understandably be reluctant to conduct any interim testing or assessment beyond the bare statutory minimum for fear of significant financial liability from parental demands for publicly funded IEEs." Thus, the hearing officer's ruling that the parents' disagreement with the FBA did not entitle them to an IEE for the additional requested assessments of OT, AT and PT is upheld.

Importantly, the court also held that the general two-year time limitation that the IDEA imposes on a parents the requirement to lodge a disagreement and set in motion the parent's right to a due process hearing within two years of the school evaluation that the parent disputes.

C. *Letter to Anonymous,* 72 IDELR 163 (OSERS 2018).

A parental request for an IEE does not trigger the IDEA's stay-put provision when a school district proposes to exit a student from special education upon reevaluation. However, if the school district files a due process request to defend its reevaluation, the district is obligated to keep the student in the current educational placement, unless the parties agree otherwise during the pendency of the IEE hearing.

JURISDICTION OF THE HEARING OFFICER; MOOTNESS

A. *Independent Sch. Dist. No. 283 v. E.M.D.H.*, Civ. No. 18-2446, 2019 WL 2371716 (D. Minn. June 5, 2019).

ISSUE: Did the appeal of the March decision divest the hearing officer of jurisdiction over the second due process hearing?

FACTS: After a seven-day special education due process hearing, a high school student was ruled eligible for special education in a March 2018 hearing decision. The hearing officer also ordered that the school district formulate an IEP with a specific placement. The school district challenged the March decision in federal court, but created a proposed IEP for the student and began to implement it upon the parents' consent.

Less than a month after the IEP was implemented, the parents requested a second due process hearing, seeking to add features to the IEP, including private behavioral supports, private community navigator services, more frequent summer services, and letter grades. Because these issues were closely related to the first hearing, the parents requested that the hearing officer from the first hearing be assigned to the second hearing. Their request was granted. The hearing officer proceeded to set the hearing schedule at a time the school district's attorney could not attend, "reasoning that another attorney could represent the District."

The school district then requested to disqualify the hearing officer and moved for summary disposition on the grounds that challenging the March decision in federal court had divested the hearing officer of jurisdiction over the contents of the IEP. The request and the motion were both denied. In July 2018, another hearing was held and the hearing officer thereafter ruled against the school district and ordered that the IEP be "immediately revised" in several respects.

The school district then challenged the propriety of the second decision in federal court.

DECISION: Yes, the hearing officer did not have jurisdiction to hear the matter. A hearing decision is final subject to the right to challenge the decision in federal court, at which point the federal court has jurisdiction over the case. After "carefully review[ing] the issues presented in the second due-process hearing and compar[ing] them to those considered in the first due-process hearing," the court concluded that "requests in the second hearing were encompassed by the first due process hearing." The court noted that the four requested items "were all part of the testimony by [the parents]' witnesses in the first due process hearing," and that the hearing officer asked the parties to include recommendations on the appropriate contents of the IEP in their closing briefs.

The court therefore concluded that the appeal of the March decision vested the federal court with jurisdiction over the required contents of the initial IEP and vacated the hearing officer's July 2018 decision.

The court also stated, in a footnote, that though it did not need to address the parties' remaining arguments, allegations that the hearing officer exhibited bias "have some merit." The court was "particularly troubled by the . . . denial of the District's request for a one-week extension of the hearing" because "[f]orcing the District to find substitute counsel who was unfamiliar with the case to represent the District at the hearing appears onerous and prejudicial."

B. *G.C. v. South Washington County Sch. Dist. 833*, Civ. No. 17-3680, 2019 WL 4600212 (D. Minn. Sept. 23, 2019)

ISSUE: Does a case seeking injunctive relief from a school district in the form of accommodations for a disabled child become moot when the student no longer attends the school district?

FACTS: A disabled student's parent sought injunctive relief in federal court requiring the school district her child was attending to make several accommodations for her child's Electromagnetic Hypersensitivity Syndrome. Specifically, she sought accommodations in the form of allowing her child to sit as far away from the wi-fi access point as possible, allowing him to connect to the Internet using Ethernet, turning down the wi-fi in his classroom, and allowing him to go to the nurse's office when he was not feeling well.

Subsequently, the child stopped attending the school district. Nevertheless, the parent contended that the case presented a live controversy and was not moot because the child may want to attend school in the district in the future. The school district agreed, voicing concerns that the dispute could resurface in the future.

DECISION: Yes. The court noted that it was "mindful of the parties' positions and the lengthy course of this litigation," but still determined the case was moot. The court determined that it could not effectively grant relief to the parties. Specifically, the court stated "the requested accommodations, if granted, would be wholly without effect" because the student was now attending a school in a different district that would not be affected by the court's order. Additionally, the court noted that the accommodations were specific to the symptoms the student experienced at his former school district.

The court also noted that it had "little confidence" that the list of requested accommodations would be effective going forward. The court indicated that the necessary relief might change in the future, especially since the student's symptoms may change in kind or severity. Accordingly, the court dismissed the case as moot.

STUDENT DISCIPLINE; "DEEMED TO HAVE KNOWLEDGE"; MANIFESTATION DETERMINATONS

G.R. v. Colonial Sch. Dist., 74 IDELR 7 (E.D. Pa. 2019)

A student who is not presently eligible for special education may still be entitled to receive IDEA disciplinary protections. The key question is whether the school district had "knowledge" that the student had a potential disability.

Noting that the parents and teachers of a high school student had no concerns about his academic performance, the court held that the district could expel the student for a weapons offense without conducting a manifestation determination.

In this case, the court opined that the district had no reason to believe that the student needed special education services due to a potential disability. None of the student's teachers expressed concerns about his grades or academic performance. During the student's high school career, the court observed, he received good grades, excelled in a vocational program focused on auto repair, and achieved "proficient" and "advanced" scores on state standardized tests.

Although the parents alleged that they frequently communicated with the district about the student's academic troubles, the court pointed out that those communications occurred while the student attended middle school and discussed his receipt of general education interventions. Moreover, records indicated that the parents never requested an evaluation or reported to the school district that the student may need special education even though their other two children received IDEA services.

Because the district had no reason to suspect that the student had a possible disability, the court concluded that the district was not required to perform an MDR before expelling the student for bringing a knife to school. It affirmed a hearing officer's order upholding the student's expulsion.

SERVICE ANIMALS

Pettus v. Conway Sch. Dist., 73 IDELR 176 (E.D. Ark. 2019).

Parent's request for a preliminary injunction requesting district be ordered to allow high-achieving 12th -grader with anxiety and depression to bring her service animal to school is denied. The ADA's regulations do not mean that a service animal's presence is always reasonable. The key question is whether the service animal would be a reasonable accommodation. Here, it would be unreasonable to require the district to allow the service animal on school grounds because the dog's presence would be a distraction to other students and for students, faculty and staff with allergies, the dog could be "truly disruptive. This would be compounded if multiple students were permitted to bring dogs to school." In addition, the district offered other ways to address the student's relatively infrequent panic attacks. For instance, the district agreed, via a 504 plan, that the student could leave the classroom and go to the school nurse or counselor at the onset of anxiety; could have an alternative seating arrangement; and could leave class early to avoid crowds. In addition, the school agreed to keep the student's prescription medication in the school nurse's office; to alert the student in advance of drills so she could avoid crowds; allow the student to be in an alternative location during assemblies; have extra time on assignments; and wear a weighted vest during panic attacks. The 504 team "voted" that the student should not be allowed to bring the dog to school, and the district decided the dog would not be allowed. The student's ability to earn straight A's, participate in band and attend football games shows that her anxiety does not impede her ability to participate in the school district's program. In addition, district staff discussed the issue and decided that the student did not need to be accompanied by her service dog—which is a decision that is entitled to the court's deference. Thus, the unlikelihood of the student's success on the merits prevents the court from granting the request for an injunction.

2019 MINNESOTA LEGISLATIVE CHANGES - PRIOR WRITTEN NOTICE; DISPUTE RESOLUTION; CONCILIATION CONFERENCES

MINN. STAT. Section 125A.091, subd.3a, is amended to read:

ADDITIONAL REQUIREMENTS FOR PRIOR WRITTEN NOTICE

In addition to federal law requirements, a prior written notice shall:

(1) inform the parent that except for the initial placement of a child in special education, the school district will proceed with its proposal for the child's placement or for providing special education services unless the child's parent notifies the district of an objection within 14 days of when the district sends the prior written notice to the parent; and

(2) state that a parent who objects to a proposal or refusal in the prior written notice may:

(i) request a conciliation conference under subdivision 7 or another alternative dispute resolution procedure under subdivision 8 or 9; or

(ii) identify the specific part of the proposal or refusal the parent objects to and request a meeting with appropriate members of the individualized education program team.

MINN.STAT. Section 125A.091, subdivision 7, is amended to read:

CONCILIATION CONFERENCE

A parent must have an opportunity to request a meeting with appropriate members of the individualized education program team or meet with appropriate district staff in at least one conciliation conference if the parent objects to any proposal of which the parent receives notice under subdivision 3a. A district must hold a conciliation conference within ten calendar days from the date the district receives a parent's ~~objection to a proposal or refusal in the prior written notice~~ request for a conciliation conference. Except as provided in this section, all discussions held during a conciliation conference are confidential and are not admissible in a due process hearing. Within five school days after the final conciliation conference, the district must prepare and provide to the parent a conciliation conference memorandum that describes the district's final proposed offer of service. This memorandum is admissible in evidence in any subsequent proceeding.