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FROM THE SCHOOLHOUSE TO THE COURTHOUSE:

Special Education Cases, Guidance, Legislation and Other Developments

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SPECIAL EDUCATION IN THE COVID-19 PANDEMIC

A. U.S. Department of Education (OSEP) Guidance

1. If a local education agency (LEA) continues to provide educational opportunities to the general student population during a school closure, the school must ensure that students with disabilities also have equal access to the same opportunities, including the provision of FAPE. SEAs, LEAs, and schools "must ensure, that to the greatest extent possible, each student with a disability can be provided the special education and related services identified in the student's IEP" or Section 504 plan. *Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease Outbreak* (March 12, 2020).

2. Ensuring compliance with the IDEA, Section 504 and the ADA should not prevent any school from offering educational programs through distance learning. Schools must provide a FAPE "consistent with the need to

protect the health and safety of students with disabilities and those individuals providing education, specialized instruction and related services to these students". The Department encourages parents, educators and administrators to collaborate creatively to continue to meet the needs of students with disabilities. The timelines for the initial development or annual review of an IEP has not changed, parents and the Team may agree to conduct meetings through video conferencing or teleconferencing. (34 C.F.R. § 300.328). Changes to the IEP after the annual IEP Team meeting may be made by the Team or the parent and school may agree not to convene an IEP Team and instead develop a written document to amend/modify the IEP. (34 C.F.R. § 300.324(a)(4)(i)). *Supplemental Fact Sheet Addressing the Risk of COVID-19 in Pre-School, Elementary and Secondary Schools While Serving Children With Disabilities*. (March 21, 2020).

3. Recognizing that schools may not be able to provide all services in the same manner that they are typically provided, OSEP has encouraged parents and LEAs to work collaboratively, in the best interest of children with disabilities to resolve disagreements that may occur. However, when informal efforts are unsuccessful, the IDEA's dispute resolution processes—mediation, state complaints and due process hearings—are still available. State complaints must be resolved within 60 days unless there are "exceptional circumstances." States will need to determine on a case by case basis whether to extend the 60-day timeline for circumstances related to the pandemic or health and safety limitations. If a parent requests a due process hearing, a resolution meeting may be held using alternative means such as videoconferencing or teleconferencing subject to the parents' agreement. *IDEA Part B Dispute Resolution Procedures* (June 22, 2020).

4. Parental consent under the IDEA may be provided by an electronic or digital signature "as long as the public agency ensures there are appropriate safeguards in place to protect the integrity of the process". The safeguards should include a statement that indicates that the parent has been fully informed of the relevant activity and the consent is voluntary. When prior written notice is required, if the parents have previously agreed or agrees during the pandemic the written notice can be provided through email. (34 C.F.R. § 300.505). The use of email is also available for providing the parent with a copy of the procedural safeguards. Regarding a parental request to inspect their child's education records, parents and schools may identify a "mutually agreeable timeframe and method" of access. Options, especially when schools are closed or limits parents/visitors/others from entering a school, may include providing the records via email, a secure online portal or postal mail. *IDEA Part B Procedural Safeguards* (June 30, 2020).

5. A provision of the CARES Act called for the Secretary of Education provide Congress with recommendations regarding the Secretary's authority to grant waivers under several federal education laws including the IDEA and the Rehabilitation Act. The Secretary did not seek any waiver authority impacting the provision of FAPE, LRE or any of the IDEA's timelines (evaluations, reevaluations, IEPs, etc.) with one exception: the Secretary is seeking the authority to extend the IDEA Part B initial evaluation timeline when a student is transitioning from Part C services. The calculation of the timeline would resume no later than the day on which health and safety factors allow face to face meetings to resume and the toddler is able to be evaluated. The toddler would continue to receive Part C services (even after their third birthday) until a Part B evaluation is completed and a Part B eligibility determination is made. *Report to Congress of the U.S. Secretary of Education Betsy Devos* (April 27, 2020).

B. Court Cases and Complaint Decisions

1. At least three class action lawsuits have been filed alleging that the IDEA was violated when IEPs were not fully implemented as written during school closures due to the pandemic. One of the lawsuits was filed against every state and local school district in the country on July 28, 2020 in New York Federal District Court. *See J.T. v. De Blasio*. Other class action lawsuits were filed in California, Pennsylvania and Hawaii. *See W.G. v. Kishimoto*, *James v. Wolf*, and *Brach v. Newsom*.

2. Five students with disabilities filed a Motion for a Mandatory Injunction asking the Court to order the school district to provide special education and related services as specified in their IEPs during school closure and summer break. The IEPs called for 4 hours of daily in school services with the assistance of a paraprofessional for each student. The Court denied the Motion. In doing so, the Court was "unpersuaded that plaintiffs have met their burden of showing irreparable harm" in the absence of the requested relief. The Court in citing *N.D. v. Hawaii Department of Education* (9th Cir. 2010) found that "Congress did not intend for the IDEA to apply to system wide administrative decisions" such as a Governor's Executive Order. *J.C. v. Fernandez* 120 LRP 21447 (D. Guam 2020).

3. *Orono Public Schs.,* 120 LRP 30736 (SEA Minn. 2020). In a complaint decision, the Minnesota Department of Education rejected the parent's claim that the school district failed to implement the student's IEP. MDE noted that Minnesota public schools switched to remote learning in March 2020 as a result of the pandemic. In response, the school district developed a distance learning plan that didn't change the amount of the

student's services but documented how it would be provided during remote learning. The parent's state complaint alleged the school district failed to implement all of the student's special education services minutes, which included 25 minutes of direct speech language services twice per week. MDE noted that in COVID-19 policy guidance, the U.S. Department of Education stated that federal disability law allows for flexibility in determining how to meet the individual needs of students with disabilities and that the provision of FAPE may include, as appropriate, special education and related services through distance instruction provided virtually, online, or telephonically. *See Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elem., and Secondary Schs. While Serving Children with Disabilities*, MDE found that the district's documentation demonstrated that the district provided the student's special education services in conformity with the 2019 IEP and 2020 distance learning plan. The school district's implementation of the distance learning plan included providing pre-recorded instructional videos by a special education teacher, live check-ins via Google Meet with a special education teacher, and daily guided independent work which included practice problems, quizzes, multiple-choice and written response questions, informal check-ins, feedback on independent work via phone calls, emails, and chat.

TRANSPORTATION; OPEN ENROLLMENT

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

FACTS: M.N.B. is a student who lives in the Big Lake School District and qualifies for special education. The Big Lake School District referred M.N.B. to an out-of-district school. Because M.N.B.'s IEP required individual transportation to and from school, M.N.B.'s parent drove M.N.B. to and from the out-of-district school and received mileage reimbursement from Big Lake.

In 2016, M.N.B.'s parent applied for open enrollment in the Osseo School District, and M.N.B. was assigned to another out-of-district school. But Osseo and the parent disputed the extent to which Osseo was required to reimburse the parent for transportation expenses. Osseo asserted that it was required to reimburse the parent only for mileage between the border of the Osseo School District to the school of attendance. At a due process hearing requested by Osseo, an ALJ ruled that Osseo was required to reimburse the parent for the full distance between M.N.B.'s home and the school of attendance. The federal district court affirmed, and the school district appealed.

ISSUES: Does the IDEA require the school district to reimburse M.N.B.'s parent for transportation between her home and the parent's school of choice?

DECISION: No. The Eighth Circuit noted that the IDEA does not speak directly to who

is required to assume the cost of transporting a student to and from a school of her parent's choice when the parent open-enrolls a student in a non-resident when a FAPE is available to her in her resident district. The court reasoned that pursuant to the Spending Clause, any imposition of a duty in the IDEA must be unambiguous, and that there is "nothing in the IDEA that provides clear notice to a State that it must cover transportation expenses when a student's travel is the result of a parent's choice under an open enrollment program." The court therefore reasoned that the state met its obligation to provide the student with a FAPE (including the individual transportation required by her IEP) in her resident school district, and the IDEA does not unambiguously require the state to do more because M.N.B.'s parent unilaterally chose to enroll her in another school district.

The Court also rejected two counterarguments made by M.N.B. First, it determined that a 1990 federal guidance letter was not persuasive authority because Minnesota's open-enrollment scheme differed from the scheme at issue in the letter and because the letter failed to address the Spending Clause issue. The Court also suggested that a previous state administrative complaint decision that had concluded that a school must provide transportation to and from school for a disabled student if transportation is a related service in the student IEP was wrongly decided. The Court concluded that "the 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.'" Accordingly, the Eighth Circuit reversed the district court's decision.

ELIGIBILITY FOR SPECIAL EDUCATION; EVALUATION PROCEDURES

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

FACTS: A student who is "plagued with various psychological disorders" was frequently absent from school starting in eighth grade and was placed on occasion in various treatment facilities. Her school guidance counselor spoke to her parents about a potential special education evaluation in ninth grade, but the parents were left with the impression that if the student was classified as eligible for special education she would no longer be able to take honors courses. The student was not evaluated for special education at that time. In tenth grade, she received various accommodations but after the first six weeks of school stopped attending. Her parents were once again told about the potential for a special education evaluation and that such a placement could affect her honors course enrollment. The parents did not request a special education evaluation until April of the student's tenth grade year.

The school district conducted an evaluation but was unable to complete observational components. The evaluation concluded that the student was not eligible. The student's parents then hired a team to perform an independent evaluation, which recommended that she receive special education. When the school district rejected the independent evaluation's recommendations, the parents filed a due process hearing request.

The hearing officer concluded the student was eligible, that the school district failed to conduct an appropriate evaluation, that the school district failed to satisfy its child-find duty to identify the student as a student in need of special education, and that the student had been denied a free and appropriate public education. The hearing officer ordered the school district to develop an IEP for the student, to conduct quarterly IEP meetings, to reimburse the private evaluation team, and to pay for retroactive and prospective private services. When the school district challenged the decision in federal court, the federal district court denied the school district's motion to supplement the record and affirmed the hearing officer's decision in all respects except one, reversing only the prospective private services. Both parties appealed.

ISSUES:

1. Did the district court abuse its discretion when it denied the school district's motion to supplement?
2. Did the school district perform an appropriate evaluation?
3. Was the student eligible for special education?
4. Did the school district violate its child-find duty?
5. Were the remedies ordered by the hearing officer appropriate?

DECISION:

The Eighth Circuit turned first to the record-supplementation question. It noted that the proposed supplementation material would have indicated how the student was performing under her new IEP and determined that such material "is immaterial to the merits of the Student's due process complaint." The court reasoned: "Evidence tending to show that the Student was making progress with the educational support she claims she was due all along would not have aided the determination of whether the [hearing officer] properly found in favor of the Student."

Next, the panel turned to the validity of the school district's evaluation. It noted that the school district admitted that it did not conduct a functional behavior assessment or systemic observations. Though the panel acknowledged that performing these components would have been difficult while the student was not in school, it concluded that the school district's failure to include these components rendered its evaluation "insufficiently informed and legally deficient." The panel then concluded that the school district's determination that the student was not eligible for special education, "resting as it did on incomplete data," was incorrect. Analyzing the federal eligibility criteria, the panel concluded the student has both an emotional disturbance and another health impairment. It rejected the contention that the student's "exceptional performance on the rare occasions she made it to class" suggests that the school district cannot provide any services to further help the student, concluding that "the Student's intellect alone was

insufficient for her to progress academically," and that the student needs special education.

Turning to the child-find question, the school district argued that the child-find claim accrued in early 2015, and the student did not request a hearing until more than two years later, after the two-year limitations period had run. But the panel reasoned "the violation was not a single event like the decision to suspend or expel a student; instead the violation was repeated well into the limitations period." Because of the school district's "continued violation of its child-find duty," the panel held that the statute of limitations did not bar the child-find claim: "at least some of the Student's claims of breach of that duty accrued within the applicable period of limitation."

Finally, the panel addressed the appropriateness of the remedies. The court determined that awarding reimbursement of the cost of the private evaluations was appropriate because it was necessary only due to the school district's failure to properly evaluate the student. For the same reason, it affirmed the award of reimbursement for private tutoring costs. It also determined that the award of prospective private educational services was appropriate in this case as a compensatory education award, concluding that "whether the district is able to provide the student a FAPE prospectively is irrelevant to an award of compensatory education." Accordingly, it reversed the district court's determination that the award of prospective services was not supported by the record and affirmed the district court's order in all other respects.

C. *Letter to Anonymous,* 119 LRP 36310 (OSEP 2019).

Is there a legal requirement under the IDEA for an evaluator to provide their evaluation report to members of the IEP Team prior to any meeting at which the report will be discussed?

The Office of Special Education Programs (OSEP) responded that the IDEA does not establish a timeline for providing the results of assessments conducted as part of the student's evaluation. Whether the parents and other Team members receive evaluation reports prior to the IEP Team meeting "is a decision that is left to State and local officials." However, the school must comply with a parent's request to inspect and review existing educational records, including evaluation reports, before any IEP meeting. This includes the right to a response from the school to reasonable requests for explanations and interpretations of the records. (34 C.F.R. § 300.613).

NOTE: Minn. Rule 3525.2710, subp. 3D states: "Upon completion of administration of tests and other evaluation materials, the determination of whether the child is a pupil with a disability as defined in Minnesota Statutes, …. shall be made by a team of qualified professionals and the parent of the pupil in accordance with item E, and a copy of the evaluation report and the documentation of determination of eligibility will be given to the parent."

PRIVATE SCHOOL TUITION REIMBURSEMENT; APPROPRIATENESS OF DISTRICT PLACEMENT

D.L. v. St. Louis City School District, 950 F.3d 1057 (8th Cir. 2020)

FACTS: A thirteen-year-old student, who had been diagnosed with autism spectrum disorder, post-traumatic stress disorder, attention deficit hyperactivity disorder, disruptive mood regulation, encopresis, and enuresis, was identified by his school district as a student with a disability, qualifying under "other health impairment." His disabilities manifested as behavioral problems and issues with toileting.

In 2016, the student's IEP team convened and decided to place him at a school called Educational Therapeutic Support at Madison ("Madison"), and to eliminate direct occupational therapy from his IEP. The parents notified the school district of their intent to seek private education at public expense, because Madison was a school for children with educational and behavioral difficulties and had no sensory room or other autism-focused supports or resources. The parents ultimately placed the student at Giant Steps, a private school providing therapeutic education to students with autism.

The student's parents brought a due process hearing request regarding the student's IEP's placement at Madison, alleging that it denied him a free appropriate public education. By the time the hearing was held, Madison had constructed a sensory room and admitted three students with autism. Accordingly, the hearing commission held that the IEP and its placement at Madison had offered a FAPE to the student.

The parents challenged the commission's decision in federal district court. The district court disagreed with the hearing commission, and determined the student was denied a FAPE when his direct occupational therapy was eliminated and he was placed at Madison; however, the district court limited tuition reimbursement to the period before the due process hearing when Madison had no sensory supports. The district court reasoned that only when the sensory supports were added did Madison became an appropriate placement for the student.

The parents appealed based on the limitations on reimbursement, and the school district appealed the finding that it had denied the student a FAPE. The school district also raised three procedural arguments.

ISSUES:

1. Did the commission lack jurisdiction over the parents' complaint?
2. Were the student's claims moot due to his move outside of the school district?
3. Was the district court's misstatement of the burden of proof reversible error?

4. Did the Madison placement deny the student a FAPE?
5. Was the School District obligated to reimburse the parents for the Giant Steps tuition?

DECISION: The Eighth Circuit first addressed the school district's procedural arguments. The school district contended that the commission lacked jurisdiction over the student's claim because he was enrolled at Giant Steps prior to the commencement of the due process hearing. But the court noted that the issue was whether he had been enrolled in the school district on the date the parents filed their request for a hearing; because he had been, the commission had jurisdiction. The court also rejected the school district's mootness argument, reasoning that the student was only seeking compensation, as opposed to prospective relief, and that compensation for past FAPE denials may be sought after leaving a school district. The final procedural issue related to the burden of proof before the commission. Finally, the Eighth Circuit agreed with the school district that the burden of proof at the hearing had been on the parents as the party seeking relief. Though the district court had misstated this burden of proof in its opinion, the Eighth Circuit reasoned that the misstatement was harmless because though the court "incorrectly described a past proceeding," it properly placed the burden of proof on the parents in the district court.

The Eighth Circuit next turned to the question of whether the Madison placement denied the student a FAPE. It determined that the commission's factual findings "establish that placement at Madison would not provide [the student] with a FAPE." Specifically, the commission found that Madison's principal was not very familiar with autism, that Madison had no students with autism or autism-specific resources, that Madison's staff had no experience with toileting issues, and that "a student who has no control over his behaviors would not benefit from instruction at Madison." The Eighth Circuit reasoned that "one of the hallmarks of autism is that the behavioral issues associated with it are involuntary," so the school district could not provide a student with autism with a FAPE "by placing him in a school limited to correcting purely voluntary behavior." The Eighth Circuit highlighted Madison's principal's testimony that Madison aims "to be that activated charcoal, take those impurities out so we can have a better student" because in "the real world ... [n]obody's going to care if you're autistic." The court reasoned that the student needed "a school equipped to manage his medically-diagnosed autism, not placement in a school designed to correct poor choices resulting in bad behavior." The court noted that though the commission had based its determination to the contrary on testimony that the student declined sensory supports, "an ill child may not prefer the taste of medicine and resist taking it, but that does not mean that the medicine is unnecessary." Because his sensory needs and need for occupational therapy were well documented in his IEPs, the Eighth Circuit affirmed the district court's conclusion that the student had been denied a FAPE.

Finally, the Eighth Circuit reviewed the district court's reimbursement decision. The court determined Giant Steps was an appropriate placement for the student because it provided sensory and speech support, weekly occupational therapy, and autism-focused resources, and the student made educational progress. The Eighth Circuit took issue with

the district court's limitation of the reimbursement based on Madison's construction of a sensory room and admission of students with autism because the school district had not informed the parents of these improvements. "Imposition of this standard would require parents to constantly monitor schools inappropriate for their children in anticipation of the first improvement that could conceivably provide an academic benefit. . . . Determining the amount of tuition reimbursement based on a school principal's testimony about a sensory room, without the District holding an IEP meeting, another vote on placement at Madison, or even offering [the] parents another opportunity to tour Madison does not comport with the purposes of the IDEA." The Eighth Circuit noted the parents also had not "been informed of how the three enrolled students with autism are faring at Madison, whether the sensory room is being used as therapy or punishment, or whether Madison has obtained other necessary autism-related resources and staff." The Eighth Circuit therefore declined to limit tuition reimbursement.

Accordingly, the Eighth Circuit affirmed the district court's holding that the school district denied the student a FAPE by eliminating his direct occupational therapy and placing him at Madison, but reversed the district court's limitation of tuition reimbursement and awarded full tuition reimbursement.

INDEPENDENT EDUCATIONAL EVALUATIONS

A. *Greenhill v. Loudon County Sch. Bd.,* 2020 WL 8555962 (E.D. Va. 2020).

ISSUES: Were the parents denied the opportunity to be meaningful participants at the eligibility meeting? The parents asserted that they did not fully understand the IEE Report and the IDEA process, and said the IDEA required school officials to read the report aloud and discuss it in detail at the meeting.

DECISION: The Court found no merit to their assertions. The parent was accompanied by an advocate at the meeting and had access to the independent evaluator (who the parent did not call as a witness). The parent misplaced the responsibility on the school to educate them regarding the IEE obtained by the parent. The Court rejected the parent's claim that the school must read aloud IEE Report and discuss it in detail at the meeting. In addition, school Team members invited the parent to share her concerns and questions at the meeting, but she rarely spoke. The fact that the parent did not get their desired result at the meeting does not itself undermine their opportunity to be a meaningful participant.

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.

IEP IMPLEMENTATION ISSUES

A. *E.C. v. U.S.D. 385 Andover*, 76 IDELR 212 (D. Kan. 2020)

ISSUE: Was the student denied a FAPE as a result of several failures by the school district to follow the student's BIP?

DECISION: The district court upheld the hearing decision that student received FAPE, even though the district failed to implement an elementary student's BIP on three occasions. While the Tenth Circuit has not decided whether parents are only entitled to relief for a "material implementation failure," other Circuits have held that parents would need to provide a significant deviation from the IEP occurred.

Although the parents were correct that an administrator violated their child's IEP in November 2016 by entering a seclusion room before the student was calm, the student's teacher had been following the BIP until then. In addition, the teacher did fail to restrain the student as required by the BIP when the student began banging his head in the seclusion room, but the teacher expressed a valid concern that the student would become more violent if restrained. In fact, the student eventually did calm down and his actions did not result in any long-term harm. Finally, as for a February 2017 incident where the school principal verbally engaged the student while he was pulling limbs off a tree (which contradicted the BIP), the principal was able to eventually calm the student. Thus, the deviations from the BIP were not material and did not deny FAPE.

B. *Coleman v. Wake Co. Bd. of Educ*., 76 IDELR 5 (E.D. N.C. 2020).

ISSUE: Did the absence of social skills instruction and "priming" opportunities deny the student a FAPE?

DECISION: While the elementary school student with autism was displaying increased disruptive and maladaptive behaviors after December 2014, the student was no longer receiving social skills instruction or priming opportunities, because the parent had started bringing the student to school after his special education classes had ended for the day in order to relieve his anxiety.

The district court said the district could not be held responsible for the parent's choices and any lack of educational progress or manifestation of behavioral problems cannot fairly be ascribed to the district, given the parent's willful failure to present the student

for core specialized academic instruction that was integral to his IEP. The parent's claim that the student's participation in special education classes exacerbated his anxiety was rejected where the student's BIP, which address the student's anxiety and fearfulness, included recommendations by private evaluators. In addition, the school's behavior specialist created a detailed spreadsheet of the techniques and interventions used in the classroom. Daily reports reflect that the student met behavioral expectations on most days leading up to December 2014. Thus, the district did not deny FAPE.

STUDENT DISCIPLINE; MANIFESTATION DETERMINATONS

A. *Boutelle v. Board of Educ. of Las Cruces Pub. Schs*., 74 IDELR 130 (D. N.M. 2019).

The district court held that the school district did not violate IDEA when it placed the middle schooler with ED and ADHD on long-term suspension.

Based upon an investigation into the incident, which included interviews with witnesses, collecting statements and completing a police report, the principal correctly concluded that the student had intentionally thrown rocks at two other students and injured them. The parent's claim that the student's behavior was a manifestation of his Tourette syndrome was rejected, where the evidence showed that the student struck a student with four rocks and then hit a second student with a rock. Before hitting the second student, the student asked a peer something like, "Do you think I can hit him with a rock?"

The court said the student's conduct indicated intentional rather than involuntary conduct based upon a complex motor tic as suggested by the parent. Thus, the school team did not err when it found that the student's rock throwing behaviors were not a manifestation of disability.

B. *Vilonia Sch. Dist. v. M.S. and T.S.*, 75 IDELR 100 (E.D. Ark. 2019).

The court ruled that alleged violent threats made by student with a traumatic brain injury (TBI) did not warrant removal from the regular school environment into an alternative educational setting. The off-campus selfies showing the student holding a gun with the caption "#ILOVEITWHENTHEYRUN," as well as other social media posts did not justify removal from campus.

The court said the evidence was not strong enough to support the school district's argument that the student was a danger to self or others. In addition to the photo with the gun, the student allegedly posted other threats on social media about self-harm and harming others. Once the district became aware of the posts, it recommended expulsion, but the parents filed a due process complaint.

The court upheld the hearing officer's decision that the district violated IDEA because maintaining the placement for the student was not shown to be substantially likely to result in injury. The social media posts were made off campus and did not target any

specific people. In addition, the school district did not provide evidence that the student threatened to commit a crime of violence or to kill anyone in particular other than himself.

PARTICIPATION IN EXTRA-CURRICULAR ACTIVITIES; SECTION 504

Clemons v. Shelby Co. Bd. of Educ., 120 LRP 19190 (6th Cir. 2020) (unpublished).

The court of appeals reversed a district court's dismissal of parent's Section 504 claim on behalf of 9th -grader with Asperger syndrome. A high school tennis coach's statement that he decided before tryouts that the student would not make the girls' tennis team that year raised questions as to whether the district excluded the student because of her disability.

The court said that to prevail, the parent must show that 1) the student has a disability; 2) the student was otherwise qualified to participate in the school's tennis program; and 3) the coach denied the student a place on the team because of her disability.

Under Section 504, an individual is "otherwise qualified" to participate in an activity if she can meet program requirements with or without reasonable accommodations. Given that the student had played tennis for three years and had won three games the year before, she might be "otherwise qualified" if she had accommodations to address her anxiety and difficulty with feedback. As for the student's exclusion from the team, the coach's statement that he decided before tryouts that the student would not make the team was significant. Where the coach cited the student's difficulties with criticism, her uneasiness around him, and her "meltdown" during a practice the previous year, all of those behaviors were attributable to anxiety and Asperger syndrome. The fact that the student apparently performed poorly during tryouts was of no consequence, because allegations suggest she was treated differently from other players because the coach determined before tryouts began that she would not make the team. While not making any findings on the merits of the parent's Section 504 claim, the case was remanded to the district court for further proceedings.

2020 MINNESOTA LEGISLATIVE CHANGES – FUNCTIONAL BEHAVIORAL ASSESSMENTS

Stand-Alone Functional Behavioral Assessments - Minn. Stat. § 125A.08(d)

A school district may conduct a functional behavior assessment as defined in Minnesota Rules, part 3525.0210, subpart 22, as a stand-alone evaluation without conducting a comprehensive evaluation of the student in accordance with prior written notice provisions in section 125A.091, subdivision 3a. A parent or guardian may request that a school district conduct a comprehensive evaluation of the parent's or guardian's student.

EFFECTIVE DATE. This section applies to functional behavior assessments conducted on or after July 1, 2020.

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