

# A “Quick Trip” THROUGH RECENT CASE LAW RELATING TO SPECIAL EDUCATION

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## 1. Minnesota Court of Appeals Reverses MDE Complaint Decision

Independent School District No. 192, Farmington v. Minnesota Department of Education,  
742 N.W.2d 713 (Minn. App. 2007).

### Facts:

During the 2005-06 school year, the student was a first grader at one of the District’s elementary schools. He was identified during his Kindergarten year as disabled and in need of special education services. The student’s primary disability was EBD, characterized chiefly by his “remarkably aggressive, assaultive behavior.” In September of 2005, a new IEP was developed that allowed for the student to made use of the resource room whenever he had verbal or physical altercations. The student’s November 2005 progress report indicated that he made adequate progress toward his academic and behavioral goals. The student’s case manager communicated regularly with the student’s father about his progress, and between September and November of 2005, she sent several e-mails noting the student was encountering difficulty mastering academic concepts, and requested that the father work with the Student at home. Following one of these e-mails in November of 2005, the father informed the case manager that he hired a tutor for the student. The teacher responded that that “sounds like a good plan to have [student] get more help with academics,” and offered to speak with the tutor about what she was working on with the student.

The student’s January 2006 progress report indicated that between November 7 and January 20, the student had 10 physical altercations with peers, and one incident where he threatened a teaching assistant with a pair of scissors toward her neck.

In February of 2006, district officials reviewed several serious aggressive incidents, and the school members of the student's IEP team decided it was necessary to make some "significant changes" to the student's program. The significant change document stated that, "beginning February 6, the student would remain in the resource room for the entire day." The case manager wrote on the "Parent Action" portion of the form that she had conversations with the student's parents on January 19 and 20, and spoke with the father in person on February 6 regarding these changes. The father maintained that he never had advance notice of the change and was not asked to approve the plan.

The student remained full-time in the resource room for several weeks, with a planned transition back to mainstream classes and activities. The student's April 2006 IEP reflected a change in setting from Level III to Level I, reflecting that he was being served in the regular classroom for the majority of the day.

On May 15, 2006, the father filed an MDE complaint, alleging (1) that the school district changed the student's federal setting without providing prior written notice; (2) the school district changed the student's placement without including the parent in the IEP team that made the decision; (3) the school district violated standards relating to IEP implementation; (4) the school district violated standards relating to progress reporting; and the school district failed to provide the student with a FAPE during the 2005-06 school year.

The MDE investigated the father's complaint. The investigative file included documents submitted by the parent and the District, copies of e-mail communications and phone conversations, and psychological reports.

On August 11, 2006, the MDE issued a decision. It sustained each allegation, finding multiple procedural and substantive violations of the IDEA. The MDE imposed corrective action, including requirements for training, compensatory education services, and the following corrective action:

Within 21 calendar days of receiving this final decision, the District will obtain an invoice for the private tutor from [father] detailing the dates, times and amounts of money paid to the private tutor by [father] during the 2005-06 school year and the summer of 2006. The District will reimburse [father] 50 percent of the total of the bill before the start of the 2006-07 school year.

**Issues:**

1. Did the MDE's investigation satisfy the requirements of 34 C.F.R. 300.661(a)(1) and (3) (2005-06)?
2. Did the MDE err by imposing partial reimbursement of a private tutor?

## Analysis:

The Court found that the MDE's decision was arbitrary and capricious because its investigation was fundamentally flawed and was not conducted in accordance with federal regulations. The Court noted that the MDE did not undertake an on-site investigation, and did not otherwise personally contact any school district personnel. The Court noted, "At no point did the MDE investigator make substantive inquiries of otherwise discuss father's allegations with school district personnel." The Court rejected MDE's argument that the investigation only required review of the relevant paperwork, noting that "MDE nevertheless conducted numerous interviews with father" and "also interviewed student's tutor, as well as father's special education rights advocates." The Court stated, "in complex cases such as this one, consideration of all relevant information should had included, at a minimum, interviews with relevant school-district personnel. This is especially true where key credibility determinations play a significant role in sustaining the complainant's principal allegations." The Court's distaste for the MDE's investigation methods was evident in this quote:

In this case, a review of "all relevant information" required not only a document review but interviews with both parties – not just the complainant and his witnesses. We hold that the MDE's failure to interview student's principal, special education teacher, classroom teacher, paraprofessional, or any other school-district personnel directly involved in the development of student's IEPs and overall education did not satisfy the regulatory mandate . . . to review all relevant information. Moreover, confidence in the MDE's investigatory process and resulting decisions is severely undermined when the MDE engages in such one-sided fact finding.

Next, the Court examined the MDE's award of reimbursement. The MDE's position was that because the School District committed multiple procedural and substantive violations, the MDE had the authority to implement virtually any corrective action it deemed inappropriate. The Court disagreed, noting that "although the MDE's supervisory is broad, it is not limitless." The Court referred to the regulation, which requires a remedy to be calculated to remediate the services that the school district failed to provide. The Court stated,

We reject the MDE's conclusion that it has unlimited discretion to impose any corrective action whatsoever, regardless of its nexus to the actual IDEA infractions committed by the school district. Such boundless governmental authority is an anathema to basic notions of substantive due process.

The Court noted that the MDE had ordered corrective action sufficient to address to address the each of the various deficiencies, and that the reimbursement award was not related to any violation. It further noted that the father's decision to hire a tutor occurred *before* the decision to transfer the student to a different placement, and thus it was illogical to order reimbursement to address the transfer. The Court also noted that the record showed the student progressed academically during the year. His private psychiatrist noted he was doing well academically, his

private tutor noted he was close to grade level by the end of the year, and he achieved passing grades. The Court found that the student had never been denied academic services, and the MDE's own decision stated that the student made progress on his academics during the year. Since no denial of services occurred, monetary reimbursement for academic tutoring was simply inappropriate. The Court stated, "We note that the MDE's position would at least implicitly authorize any parent of a child receiving special-education services under the IDEA to be reimbursed for the cost of a private tutor . . . the policy and financial implications of such a ruling go far beyond what we believe the IDEA contemplates or authorizes."

## **2. Eighth Circuit Provides Guidance on FAPE and Clarifies Burden of Proof in MN**

**M.M. by and through her parent and natural guardian, L.R. v. Special School District No. 1, 512 F.3d 455 (8<sup>th</sup> Cir. 2008).**

### **Facts**

The Student was eligible for special education under the SNAP,<sup>1</sup> Emotional/Behavioral disorder (EBD) and Speech/Language designations. She began to have serious behavioral issues in 6<sup>th</sup> grade including bringing a steak knife to school to fight with two other girls. She was re-evaluated and a new IEP was developed addressing academics and behavior. A behavior intervention plan (BIP) was designed to decrease inappropriate behavior and increase her work completion.

### **2003-2004**

In February 2004, the student punched a staff member who attempted to break up a fight between her and another girl. The team's meeting notes said "the setting here at [school] is inappropriate." (The district did not propose another IEP with a more restrictive setting.) She was transferred to another school where she completed the year. Her progress reports noted she had made adequate progress in reading and math goals but insufficient progress behaviorally. A social worker testified that the student made some behavioral progress. The Administrative Law Judge (ALJ) held that the failure to review and revise the IEP before the transfer and the many suspensions created educational harm and she awarded 20 hours of compensatory education service to the student for this period of time.

### **Charter School**

The next school year the student enrolled in a charter school but re-enrolled in the district one month later. The 8<sup>th</sup> Circuit determined that the ALJ's award of 20 hours of compensatory education was incorrect because the parent did not protest the transfer by requesting a hearing and she did not allow the district any time to revise the IEP before the transfer to another school. The Court found that the child had made academic and behavioral progress and that the IEP was

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<sup>1</sup> SNAP – student in need of alternative programming. Minneapolis has permission to use this alternative eligibility criteria.

appropriate at the time it was developed. “When a child’s primary disability is a behavioral disorder, the school district does not violate IDEA simply because the child failed to achieve the IEP’s behavioral goals.”

### **2004-2005**

The student’s behavior became more disruptive. She was suspended three times in October and November. The team increased her special education time to a setting II program. The district created a new BIP with a point sheet and progressive discipline for misbehavior. After ten days of suspension, the district did a functional behavioral analysis (FBA) which recommended more intensive behavior support. Despite these difficulties, the student’s progress reports showed progress in academics and speech and noted she was “working on” her behavioral goals.

The student struck a child with disabilities in the face and was suspended. The team met and agreed that the current school was inappropriate and that the student required a setting III program. The school offered a setting III at [school 1] which the parent rejected because there were too many boys. The district offered five hours of homebound which the parent rejected as insufficient. The district had a setting III program at [school 2] which had mostly girls but it had no openings. The district offered mediation and at mediation, the parent agreed to another transfer and to visit [school 2]. The parent did so and reported that she was told that it was a behavior program without sufficient academic emphasis.

The student began at [school 3] as agreed in mediation and was suspended for fighting with other girls using mace right away. The school offered homebound instruction for five hours per week. The parent rejected this and the school allowed the child to return but required that she be searched each morning for weapons. The parent withdrew the child and the district advised they would begin truancy proceedings. The parent returned the child and the student was subjected to a daily search. The parent requested hearing.

### **ALJ’s Award**

The ALJ found that the student required a setting III program but denied the student a FAPE when it proposed Jordan Park for five months because of the high boy to girl ratio and by repeatedly suspending the student. The ALJ ordered that the student be placed at [school 2] in the setting III program and awarded 168 hours of compensatory education.

### **Appeal to Federal District Court**

The parent brought an action in federal court to recover her attorneys’ fees and the district counterclaimed asserting that the ALJ’s decision was in error. The federal district court reduced the 168 hours of compensatory education by 20 hours and upheld the rest of the ALJ’s award. It awarded the parent her attorneys’ fees. The district appealed to the 8<sup>th</sup> Circuit Court of Appeals.

### **Appeal to the 8<sup>th</sup> Circuit**

The district argued that the burden of proving the student did not receive FAPE should have been on the parent not on the district and that when the student left the district to attend a charter school she did not retain her right to claim a denial of FAPE. The district also asserted that regardless of these legal questions, the decision should be reversed because the district had an appropriate IEP in place at the time it was created and it offered the setting III program that was ultimately ordered.

The 8<sup>th</sup> Circuit held that the burden of proof is on the party that brings the claim and in this case it was reversible error to assign the burden of proof to the district. The Court also held that on the merits (or on the facts) the prior decisions were incorrect because the district had to implement the stay put which was ultimately found to be an incorrect placement. Because it had to implement the stay put, the district could not be faulted for suspending the student when she engaged in assaultive behavior or brought weapons to school. The Court reversed the findings against the district and reversed the award of attorneys' fees to the parent and her attorney.

The time period for requesting a writ of certiorari to United States Supreme Court ends shortly.

### **3. Charter School may Place a Student Out of District & Parent Conduct May Create a "Disruptive Force"**

#### **In the Matter of [Student] by and through her parents and natural guardians v. Independent School District No. 4075**

##### **Facts:**

In this case, a student who qualified for services under the category of severely, multiply impaired (SMI) enrolled in a charter school that had about 150 students in one junior/ senior high school building. The student had an Independent Education Evaluation at her prior school but it was never completed. It called for a systematic evaluation of the student's communication abilities. The charter school offered the evaluation four times during the student's tenure there but the parents refused to grant permission for it. They argued that the student should be educated in the general education environment or setting I program at the charter school.

After several years of attempting to create appropriate programming for this student and after parents and staff voiced concern that the student was not progressing, the charter school made attempts to obtain parental agreement to change the student's placement to a setting III program located in her resident district with its agreement. When no agreement was reached, the charter school requested a hearing.

##### **Issues:**

After a nine day hearing, the Hearing Officer found that the analysis of least restrictive environment (LRE) a qualification that the LRE requirement is to be implemented to the "maximum extent appropriate" and that if a free appropriate public education (FAPE) can not be achieved in the mainstream, the student is to be removed if they are not benefiting from the mainstream programming, marginal benefits that may be gained are outweighed by the benefits

from a separate setting and the child is a “disruptive” force in the mainstream. *See Pachl v. Seagren*, 453 F.3d 1064, 1068 (8<sup>th</sup> Cir 2006)(citations omitted).

### **Hearing Officer’s Order:**

The Hearing Officer determined that the charter school’s setting I environment was not conducive to providing the student with a FAPE because it lacked the expertise to provide the student with a FAPE and that the student required the systematic evaluation that had been recommended. This required that the student have intensive one to one instruction as well as mainstream education. The Hearing Officer also determined that the necessary expertise was available in a setting III program that was offered and happened to be the student’s resident district. The resident district was legally obligated to provide the program but also welcomed the student and testified to their confidence in their ability to program for her.

The Hearing Officer took note of the three large binders of email communications, the daily parental visits, their demands and control of the programming. She determined that while the student was not disruptive, her parents conduct was and given her SMI needs, she could not be viewed apart from her parents. The Hearing Officer ordered that the student be educated in the setting III program as a result. The case is on appeal and the parents have brought claims of discrimination for attempting to remove the student from the setting I placement.

### **4. Student with ADHD Not Eligible for Special Education Services**

#### **Strock v. ISD No. 281, F.3d (06-CV-3314)(D.Minn. 2008)**

#### **Facts:**

The student entered District 281 with a diagnosis of ADHD and no prior special education services according to his father. The student earned C’s and D’s in general education and passed the Basic Standards Tests. He often failed to turn in assignments and sometimes did poorly on test; as a result he qualified for a 504 Plan in his senior year. The Plan included having extra time and text books at home among other things. The Court noted that the teachers provided the accommodations and always responded to the parent’s concerns in a timely manner. The student earned sufficient credits to graduate but his parent requested a due process hearing and claimed the boy was unprepared for college and that he needed special education to have progressed in high school. The student graduated from high school. An administrative law judge dismissed the due process hearing apparently based on the student’s graduation.

#### **Issues.**

The parent and student appealed and brought a claim against the District alleging that the District failed to identify him as in need of special education and that as a result of the failure to provide individualized instruction, the student was not prepared for college. The parent and student alleged that the District had discriminated against them.

The Federal Court required that a hearing occur and the administrative law judge found that the student did not qualify for special education. Interestingly, the student had been accepted to

Normandale Community College but choose not to attend. He had been placed in a remedial math class there but the evidence showed that 70% of the graduates from his high school required that course at Normandale.

**Held:**

The Court found that the administrative law judge's holding that the student did not qualify for services was appropriate. It also found that the District's implementation of the 504 Plan was appropriate and that the student's lack of readiness for college was not the result of poor transition planning but simply a factor for many students. The Court held that on these facts there is no claim of discrimination. "To the contrary, the Court easily finds the District's continuous efforts to accommodate the wishes of [student] and his father offer compelling evidence to the contrary."