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Outside Providers:
Teletherapy, ABA, and What's FAPE Got to Do With It?

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NOTE: The purpose of this presentation, and the accompanying materials, is to inform you of interesting and important legal developments. While current as of the date of presentation, the information given today may be superseded by court decisions and legislative amendments. We cannot render legal advice without an awareness and analysis of the facts of a particular situation. If you have questions about the application of concepts discussed in the presentation or addressed in this outline, you should consult your legal counsel. ©2026 Ratwik, Roszak & Maloney, P.A.

I. INDIVIDUALS WITH DISABILITIES EDUCATION ACT ("IDEA").

A. Free Appropriate Public Education ("FAPE").

1. FAPE Requirement. IDEA requires that school districts provide a FAPE to students with disabilities. 20 U.S.C. §1400(d)(1)(A).

2. FAPE Standard. A student receives a FAPE if the student's individualized education program ("IEP") is "reasonably calculated to enable [the] child to make progress appropriate in light of the child's circumstances." *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 1001 (2017). What "appropriate" progress looks like will vary from child to child. *Id.*

B. Special Education and Related Services.

1. Special Education Services. "Special education" services are "specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability," including "instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings." 34 C.F.R. § 300.39(a)(1). The content, methodology, and delivery of the services must be adapted to "address the unique needs of the child that results from the child's disability" as well as to "ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the [school] that apply to all children." 34 C.F.R. § 300.39(b)(3).

2. Related Services. "Related services" are "developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education." 34 C.F.R. § 300.34(a). "Related services" must be included in the student's IEP. 34 C.F.R. § 300.320(a)(4). If a particular service is not necessary to assist a child with a disability to benefit from special education, the school district does not need to provide it. *See* 71 Fed. Reg. 46,569 (2006) ("Nothing in the Act or in the definition of related services requires the provision of a related service to a child unless the child's IEP Team has determined that the related service is required in order for the child to benefit from special education and has included that service in the child's IEP.").

C. Least Restrictive Environment ("LRE").

1. LRE Requirement. The LRE requirement obligates school districts to educate students with disabilities, to the maximum extent appropriate,

with children who do not have disabilities. 20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2). As such, the following should be true: "special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 20 U.S.C. § 1412(a)(5)(A). For instance, one-to-one ABA therapy from a private provider will likely be considered more restrictive than small group instruction at a school in the school district. *See Mark A. v. Grant Wood Area Educ. Agency*, 795 F.2d 52, 53 (8th Cir. 1986); *Grant v. Indep. Sch. Dist. No. 11*, 2005 WL 1539805, at *10 (D. Minn. June 30, 2005).

2. Continuum of Alternative Placements. "The IDEA implementing regulations therefore provide for a continuum of alternative placements—instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions to ensure a school district can meet the needs of children with disabilities for special education and related services." *J.P. ex rel. Ogden v. Belton Sch. Dist. No. 124*, 40 F.4th 887, 890 (8th Cir. 2022) (citing 34 C.F.R. § 300.115) (internal citation marks).

3. Placement Decision. "The IDEA does not allow a school to place a child in a less restrictive environment in which he or she makes little or no progress towards appropriate educational goals." *J.P.*, 40 F.4th at 890. Instead, "[i]t is appropriate under the IDEA to place a student in a less integrated setting when the [student with a disability] would not benefit from mainstreaming, when any marginal benefits received from mainstreaming are far outweighed by the benefits gained from services which could not feasibly be provided in the non-segregated setting, and when the [student with a disability] is a disruptive force in the non-segregated setting." *Id.* at 892 (internal citation marks and citations omitted).

II. SELECTION OF METHODOLOGY AND PROVIDERS.

A. IEP Team and Parental Input.

1. Team Members. Generally, IEP teams must include: (1) the parents; (2) a regular education teacher "if the child is, or may be, participating in the regular education environment;" (3) a special education teacher or, where appropriate, a special education provider; (4) a school district representative; and, in certain situations; (5) the child with a disability. 34

C.F.R. § 300.321(a). The IEP team must also include an "individual who can interpret the instructional implications of evaluation results" and, at "the discretion of the parent or the [school district], other individuals who have knowledge or special expertise regarding the child." *Id.* In addition, in certain situations related to transition services, a representative of a participating agency may require to be invited. 34 C.F.R. § 300.321(b).

a. Member Selection. "[A]ppropriate professionals," which could include speech-language pathologists, should be included in the evaluation and eligibility determination as well as in the IEP meetings to develop the IEP. *Dear Colleague Letter*, 66 IDELR 21 (OSEP 2015). Districts should not have a set practice of always "including applied behavior analysis (ABA) therapists exclusively without including, or considering input from, speech language pathologists and other professionals who provide different types of specific therapies that may be appropriate for children with [autism spectrum disorder ("ASD")] when identifying IDEA services for children with ASD." *Dear Colleague Letter*, 66 IDELR 21 (OSEP 2015).

b. Excusing Team Members. A required member of the IEP team from the school district can be excused from an IEP meeting, in whole or in part, if:

   i. the parent and school district agree, in writing, that "the attendance of the member is not necessary because the member's area of the curriculum or related services is not being modified or discussed in the meeting;" or

   ii. "when the meeting involves a modification to or discussion of the member's area of the curriculum or related services" if the parent—in writing—and school district agree and the "member submits, in writing to the parent and the IEP Team, input into the development of the IEP prior to the meeting." 34 C.F.R. § 300.321(e).

c. Purpose. The IDEA's IEP process is "designed to ensure that an appropriate program is developed to meet the unique individual needs of a child with a disability, and that services are identified based on the unique needs of the child by a team that include the child's parents." *Dear Colleague Letter*, 66 IDELR 21 (OSEP 2015).

2. Educators' Role. Educators on the IEP team must consider the input provided. Specifically, "[c]ompeting opinions and parental preferences should be considered during the formulation of an IEP." *Gill v. Columbia 93 Sch. Dist.*, 217 F.3d 1027, 1037 (8th Cir. 2000). In fact, "[p]arents and guardians play a significant role in the IEP process, and a school district cannot refuse to consider their concerns or evidence when drafting an IEP. . . . [W]hen a school district predetermines the educational program to be provided to a [student with a disability], including the student's placement, prior to meeting with the parents and closes its mind to the concerns or evidence of the parents, the IEP is procedurally flawed and must be set aside because the parents were deprived of any meaningful opportunity to participate in the formulation process." *Fort Osage R-1 Sch. Dist. v. Sims ex rel. B.S.*, 641 F.3d 996, 1005 (8th Cir. 2011).

3. Parent's Role. "Parents who believe that their child would benefit from a particular type of therapy are entitled to present their views at meetings of their child's IEP team, to bring along experts in support, and to seek administrative review." *Gill*, 217 F.3d at 1038. However, IDEA "does not empower parents to make unilateral decisions about programs the public funds." *Id.*

B. Types of Methodologies.

There are many programs to educate students with disabilities. For instance, "ABA therapy is just one methodology used to address the needs of children with ASD and . . . [schools must] ensure that decisions regarding services are made based on the unique needs of each individual child with a disability." *Dear Colleague Letter*, 66 IDELR 21 (OSEP 2015). In fact, "autism experts have a variety of opinions about which type of program is best." *Gill*, 217 F.3d at 1038.

C. Selection of Methodology and Providers.

1. Selection of Methodology. Whether a student with a disability needs a specific methodology is an IEP team decision and depends on the needs of the individual child. *See Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities*, 71 Fed. Reg. 46,540, 46,665 (Dep't of Educ. Aug. 14, 2006). For "many children," a specific methodology—such as ABA therapy—is not needed to provide a FAPE and thus, the IEP would "not need to address a specific approach." *See Letter to Wilson*, 37 IDELR 96 (OSEP 2002) (stating such is true under Part C of IDEA); *Letter to Anonymous*, 49 IDELR 258 (OSEP 2007) (same). In that case, the educators can select the methodology as long is the student is being provided a FAPE in the

LRE. *E.S. v. Indep. Sch. Dist.*, No. 196, 135 F.3d 566, 569 (8th Cir. 1998); *Gill*, 217 F.3d at 1038.

However, in "some cases," a student's unique needs may require a "particular methodology or instructional approach" and in such a situation the IEP team must propose an IEP or serve the student with an IEP that provides the particular methodology or instructional approach. *See Letter to Wilson*, 37 IDELR 96 (OSEP 2002) (stating such is true under Part C of IDEA); *Letter to Anonymous*, 49 IDELR 258 (OSEP 2007) (same); *see also A.M. v. New York City Dep't of Educ.*, 845 F.3d 523, 545 (2d Cir. 2017) (holding a school district "was bound, at a minimum, to require some level of ABA support in a 1:1 classroom setting").

2. Selection of Provider. The educators can select the providers as long as the student is being provided a FAPE in the LRE. *Slama ex rel. Slama v. Indep. Sch. Dist. No. 2580*, 259 F. Supp. 2d 880, 884-886 (D. Minn. 2003); *see also Gill*, 217 F.3d at 1038. Furthermore, if a school district can provide a student a FAPE with its employees, the school district is not required to utilize the services of an outside provider regardless of whether the parent requests such or the outside provider is more equipped than school district employees to serve the student. The Minnesota federal district court explicitly held such in *Slama*, 259 F. Supp. 2d 880. In that case, a school district refused to allow a parent's preferred outside provider to be a student's personal care attendant ("PCA") without a clear reason beyond the outside provider not being a school district employee. *Id.* at 885. Instead, the school district selected a school district employed educational assistant. *Id.* at 881. The court held that the school district did not deny the student a FAPE. *Id.* at 886. The court reasoned that the school district's obligation was only to assign a PCA who was capable of providing the student a FAPE and that, while the preferred outside provider may have been the "best," the preferred outside provider was not necessary for the student to receive a FAPE. *Id.* at 885; *see also id.* at 882.

D. Courts' Review of the Selection of Methodologies.

"Federal courts must defer to the judgment of education experts who craft and review a child's IEP so long as the child receives [a FAPE] and is educated alongside his [] classmates [without disabilities] to the maximum extent possible." *Gill*, 217 F.3d at 1038.

III. RESPONDING TO PARENTAL REQUESTS RELATED TO METHODOLOGY AND PROVIDERS.

A. Responding to a Parent's Request for a Specific Methodology or Provider.

1. Responding to Parents' Requests for Specific Methodology or Specific Provider. While the school district must consider the parent's request, it does not necessarily have to agree to the request. The key inquiry is what the student needs to receive a FAPE. As noted above, if the IEP team determines that the student is or can be provided a FAPE without the requested methodology or provider, the school district does not have to acquiesce to the parent's request. However, if the IEP team determines that the student needs the requested methodology or provider to receive a FAPE, the IEP team must propose an IEP that includes such.

2. Responding to Parents' Rejection of a Proposed IEP that Does Not Provide the Specific Methodology or Provider. The school district should promptly offer the parent an opportunity to participate in one of IDEA's or the State's collaborative dispute resolution processes, such as a conciliation conference, a facilitated IEP team meeting, or mediation. The school district should attempt to reach an agreement with the parent and make clear that it stands ready to serve the student. The school district should also keep the proposed IEP and written rejection in the student's file, as well as document its efforts to reach an agreement with the parent. *See Buffalo-Hanover-Montrose Independent School District #877*, 112 LRP 32683 (Minn. SEA 2011) (holding the District provided a FAPE as it offered services, sought to reach an agreement regarding the services, and made it clear it stood ready to serve the student).

3. Acquiescing to Parents' Requests Solely to Reach Agreement? Acquiescing to a parent's request is not necessarily a viable option even if the attempts to reach an alternative agreement are unsuccessful. If granting the request will not provide the student a FAPE in the LRE, the school district cannot grant the request. Nonetheless, granting a parent's request may be a viable option in some situations even if it is not required for the student to receive a FAPE. To the extent that acquiescing to the parent's request will not violate the student's right to a FAPE in the LRE, the school district can grant the request.

B. Responding to a Parent's Request for a Student to Receive Private Services at School.

1. Consider the District's Obligations under IDEA and Section 504 of the Rehabilitation Act of 1973 ("Section 504"). Remember to analyze whether the request triggers obligations under IDEA and Section 504. This will be a fact-specific determination.

2. District Policy. "Pursuant to the Section 504 regulation[s], a district may need to make adjustments to its policies to provide a student with a disability aids, benefits or services that are as effective as those provided to students without a disability." *Seminole Cnty. (FL) Pub. Schs.*, 68 IDELR 23 (OCR 2016); *see also* 34 C.F.R. § 104.4(b). Likewise, "[t]he Title II implementing regulation[s] state[] that a public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity." *Seminole Cnty. (FL) Pub. Schs.*, 68 IDELR 23 (OCR 2016); *see also* 28 C.F.R. § 35.130(b)(7).

3. Note regarding Data Privacy. The Family Educational Rights and Privacy Act ("FERPA"), as well as State laws, protect the privacy of educational records. However, the federal Student Privacy Policy Office ("SPPO") held that a district staff member being present during a student's virtual therapy session with a private therapist did not implicate FERPA as FERPA addresses 'education records," not the "confidentiality of information in general." In addition, the SPPO held that, "as a general rule, information that is obtained through personal knowledge or observation, and not from an education record, is also not protected from disclosure under FERPA." *Letter to Anonymous*, 122 LRP 14874 (SPPO 2021).

IV. PARENTALLY PROVIDERED SERVICES.

A. FAPE Considerations.

1. Consider FAPE. Schools must consider FAPE when determining how to respond to parentally provided private services during the school day.

2. Shortening the "Regular" School Day. For IDEA-eligible students, use the IEP process to shorten a student's school day. A student's school day should only be shortened to meet a student's individual needs.

B. Attendance Considerations.

1. Consider Attendance. Schools must consider attendance when determining how to respond to parentally provided private services during the school day.

2. Compulsory Attendance Laws. States typically have laws and schools typically have policies that address a student's attendance at school and under what circumstances attendance may be excused. Minnesota has such laws. *See* Minn. Stat. § 120A.22, subd. 5(a), subd. 6(a), subd. 12.

3. Modification to Attendance Policy. Section 504 and the Americans with Disabilities Act can require the reasonable modification of an attendance policy in addressing a student's absences resulting from parentally provided services during the school day. *See Seminole Cnty. (FL) Pub. Schs.*, 68 IDELR 23 (OCR 2016).

C. Care and Treatment.

Schools must consider whether Minnesota's care and treatment rule is triggered.

D. Reimbursement for Private Services.

"Parents are not entitled to reimbursement for the cost of providing a private education to a [student with a disability] unless the school district has not offered a free appropriate public education and the private placement is appropriate." *Gill*, 217 F.3d at 1037.

E. OAH No. 21-1300-38944 (Minn. SEA 2023).

1. Facts. During the 2021-22 school year, a student with an ASD diagnosis attended school five days per week in accordance with the student's IEP. The student made adequate progress on the student's IEP goals without regression. The student also received a Comprehensive Multi-Disciplinary Evaluation ("CMDE") and qualified for Early Intensive Developmental and Behavioral Intervention ("EIDBI") through the State of Minnesota based upon medical necessity. While the CMDE did not conclude that ABA was educationally necessary, it recommended that the student receive ABA 35 to 50 hours per week, including in school.

   During approximately the 2022 summer, the student began receiving ABA therapy. The overall progress was "mixed."

During the 2022-23 school year, the student's IEP was again designed for the student to attend school five days per week. At the beginning of the school year, the student's parent requested for the student to receive ABA sessions at school. The school district rejected the request because it "did not allow private ABA therapists to come into its schools and reiterated [the] offer 'to have regular virtual meetings with [the therapist] or go observe [the student] at ABA therapy." Also, at the beginning of the 2022-23 school year, a doctor recommended that the student continue to receive special education services and ABA therapy. It was not recommended that the student specifically receive ABA therapy in school or instead of attending school.

Shortly thereafter, the parents notified the school district that the student would miss school three days per week to attend ABA therapy and the student's IEP team met to discuss the parents' request to have the student's ABA therapist attend school. The school district rejected the parents' request based on the student's educational needs, least restrictive environment ("LRE") considerations, school district professionals being able to meet the student's needs, compulsory attendance law, school district policy, and a lack of space at school.

In the winter of the 2022-23 school year, the student received another CMDE. The evaluator recommended 15 to 30 hours per week of ABA, including at the school.

Throughout the school year, the student attended ABA therapy three days per week. School district staff collaborated with Student's EIDBI providers. The student continued to make "some progress on the goals and objectives in [the student's] IEP." However, the student's "attendance at school for less than 40% of the time expected in [the student's] IEP . . . resulted in stagnation in some areas and, in some instances, regression, of [the student's] progress toward some of [the student's] goals."

2. Issue. Did the district deny the Student a FAPE by refusing to allow the student's private ABA therapist to attend school? If so, is the student entitled to compensatory education for the days the student went to ABA therapy instead of attending school?

3. Holding. The administrative law judge ("ALJ") held that the student does not have an educational need nor a medical need for an ABA therapist at school. The ALJ further held that the parents "have not established that

Student is regressing because of not having [Student's] ABA therapist attend school with [Student]." Instead, the ALJ held that, "[t]o the extent that Student is not making expected progress, the lack of progress is most likely attributable to the failure to attend school five days a week." As such, "[t]o the extent that Student is not accessing [Student's] education, this is due to Parents' choosing ABA therapy with their preferred provider over school."

The ALJ further held that adopting Parents' request would not have complied with the LRE requirement. It would have "restrict[ed] Student's ability to attend class and interact with neurotypical children. As such, it would have been "unnecessarily restrictive where, as here, collaboration and consultation between providers will foster Student's progress."

The ALJ also held that, "[a]ssuming that some amount of ABA therapy is 'medically necessary' for a student, a district must evaluate the basis of the request, the purpose of the proposed services, and the potential for disruption." The ALJ held that the school district's concerns about "the presence of additional people in the classroom" potentially being "overstimulating and distracting to other students" is a "valid" concern.

In sum, the ALJ concluded that the district provided the student a FAPE. The ALJ also held that the student is not entitled to compensatory education.

V. CARE AND TREATMENT.

A. State Laws. States can have laws relevant to care and treatment for students.

B. Minnesota's Care and Treatment Laws.

1. Legal Provisions.

   a. For purposes of Minnesota Rules, part 3525.2325, "pupils and regular education students placed in the following facilities by someone other than the district are considered to be placed for care and treatment: chemical dependency and other substance abuse treatment centers; shelter care facilities; home, due to accident or illness; hospitals; day treatment centers; correctional facilities; residential treatment centers; and mental health programs." Minn. R. 3525.2325, subp. 1.

b. "The district in which the facility is located must provide regular education, special education, or both, to a pupil or regular education student in kindergarten through grade 12 placed in a facility, or in the student's home for care and treatment. Education services must be provided to a pupil or regular education student who is:

i. prevented from attending the pupil's or student's normal school site for 15 consecutive school days; or

ii. predicted to be absent from the normal school site for 15 consecutive school days according to the placing authority, such as a medical doctor, psychologist, psychiatrist, judge, or other court-appointed authority; or

iii. health-impaired and in need of special education and predicted by the team to be absent from the normal school site for 15 intermittent school days."

Minn. R. 3525.2325, subp. 1.

c. "The responsibility for special instruction and services for a child with a disability temporarily placed in another district for care and treatment shall be determined in the following manner:

i. When a child is temporarily placed for care and treatment in a day program located in another district and the child continues to live within the district of residence during the care and treatment, the district of residence is responsible for providing transportation to and from the care and treatment program and an appropriate educational program for the child. . . . The resident district may provide the educational program at a school within the district of residence, at the child's residence, or in the district in which the day treatment center is located by paying tuition to that district.

ii. When a child is temporarily placed in a residential program for care and treatment, the nonresident district in which the child is placed is responsible for providing an appropriate educational program for the child and necessary transportation while the child is attending the educational program; and must bill the district of the child's residence

for the actual cost of providing the program, as outlined in section 125A.11, [with limited exceptions].

iii. The district of residence shall pay tuition and other program costs, not including transportation costs, to the district providing the instruction and services. . . . Transportation costs must be paid by the district responsible for providing the transportation and the state must pay transportation aid to that district."

Minn. Stat. § 125A.15; *see also* Minn. Stat. § 125A.515, subd. 3 ("The district in which the children's residential facility is located must provide education services, including special education if eligible, to all students placed in a facility.").

d. Students "who are absent from, or predicted to be absent from, school for 15 consecutive or intermittent days, and placed at home or in facilities not licensed by the Departments of Corrections or Human Services are entitled to regular and special education services consistent with this section or Minnesota Rules, part 3525.2325. These students include students with and without disabilities who are home due to accident or illness, in a hospital or other medical facility, or in a day treatment center." Minn. Stat. § 125A.515, subd. 10.

2. Decisions.

a. In *Anoka-Hennepin Independent School District #011*, 107 LRP 60653 (Minn. SEA 2007), the student's doctor recommended that the student receive homebound education for the last 18 school days of the school year because of his anxiety. Therefore, the district was required to provide him services pursuant to Minnesota Rules, part 3525.2325.

b. In *Northfield Public Sch. Dist.*, 109 LRP 59359 (Minn. SEA 2008), MDE held that, pursuant to Minn. R. 3525.2325, "homebound instruction" was required to be provided if a student was absent for 15 consecutive days "due to being placed at home, due to … illness." The student missed 10 consecutive days one month followed by additional absences in the subsequent months due to anxiety. After the "majority" of the student's absences, the student's psychologist opined that the student needed a "more

therapeutic school placement" but did not opine that the student had "a need for homebound." MDE determined that the school district did not violate Minn. R. 3525.2325 by not providing homebound services during the periods that the student's disability prevented him from attending school because the school district was unable to predict that the student would be prevented from attending school for 15 consecutive days due to being placed at home, due to illness.

c. In *St. Paul Independent School District #625*, 109 LRP 35701 (Minn. SEA 2006), the student had a "history of missing in excess of 20 school days per school year related to anxiety" that the District was aware of by the end of the 2003-04 school year and his IEPs during the 2004-05 "all addressed the Student's anxiety" so that he "could attend school on a regular basis." "Accordingly, the District should have predicted that the Student's disability would negatively impact his school attendance resulting in 15 or more intermittent absences and should have addressed how the Student would receive his IEP services during those absences."

"[B]y the time the Complainant requested homebound services on May 24, 2005, the Student had missed 12 intermittent school days due to his OHD (10 in May), and the Student's IEP team knew, or should have known, that it was likely he would miss three or more school days by the end of the school year due to his OHD and its impact on his inability to attend school. At that point, the District's failure to address the provision of the Student's IEP services during his absences from school, including 10 days in May 2005, resulted in educational harm to the Student" and the Student is "entitled to compensatory educational services."

By the end of November 2005, the Student had missed 12 full school days during the 2005-06 school year. "At that point, given the District's knowledge that the Student's disability impacted his school attendance, the Student's IEP team should have predicted that he would be absent 15 or more intermittent school days by the end of the 2005-06 school year. The District should have scheduled an IEP team to address the Student's sporadic attendance and to determine how to provide the Student's IEP services during absences."

"By the end of January 2006, the Student had missed 24 full school days and 16 partial days. It is reasonable to assume that the

Student suffered educational harm when he was then absent for the majority of the instructional time in February 2006" and the "Student is entitled to compensatory services."

In sum, regarding Minnesota's care and treatment laws, the District was found to have "violated Minn. R. 3525.2325 when it failed to provide regular and specialized instruction to the Student based upon his predicted and actual absences of 15 intermittent school days or more during the 2004-05 and 2005-06 school years."

C. Placement of a Student with a Program for EIDBI or ABA.

1. According to Minnesota Department of Education ("MDE") "guidelines," neither the placement of a student with a program for Early Intensive Developmental and Behavioral Intervention ("EIDBI") or ABA should "automatically" be considered a placement for care and treatment under Minnesota law. *Early Intensive Developmental and Behavioral Intervention (EIDBI) or Applied Behavior Analysis (ABA)* (MDE 2026).

2. MDE advised that "determinations of placements for care and treatment should be managed by schools on a case-by-case basis" and "[a]vailable information from involved providers of EIDBI and ABA services with appropriate licensure should be considered in each case." *Id.*

3. MDE advised that placement of a student with a program for EIDBI or ABA should generally be considered a placement for care and treatment if the student's district of residence and parents agree:

    i. "the placement is necessary for the child's physical or mental health;"

    ii. "the school district cannot provide equivalent services that would allow the student to attend school rather than being absent from school during the placement;" and

    iii. "absence from school for 15 or more consecutive or intermittent school days is predicted for the student during the placement." *Id.*

VI. INSTRUCTION OUTSIDE THE "REGULAR" SCHOOL DAY.

A. Legal Principle.

IDEA's FAPE requirement obligates a school district to educate a student outside the "regular hours of the school day" if it is necessary to provide the student a FAPE. *Osseo Area Sch. v. A.J.T. ex rel. A.T.*, 96 F.4th 1062, 1066 (8th Cir. 2024).

B. *A.J.T. v. Osseo Area Schools*.

1. Facts. A.J.T. has a form of epilepsy. A.J.T. did not attend school until noon. Pursuant to her IEP, A.J.T. received intensive special education from noon until after the school day at 4:15 p.m. A.J.T.'s parents made requests for A.J.T. to receive additional evening instruction, but the District denied the requests.

2. Issue.

   a. Did the District deny A.J.T. a FAPE in violation of the IDEA?

   b. Did the District engage in disability discrimination in violation of Section 504 and Title II of the Americans with Disabilities Act ("ADA")?

3. IDEA Holding. The panel held that the school district denied the student a FAPE.

   a. The panel held that IDEA's FAPE requirement obligates a school district to educate a student outside the "regular hours of the school day" if it is necessary to provide the student a FAPE.

   b. The panel held that A.J.T. made "only slight progress in a few areas" over a period spanning multiple school years. For instance, A.J.T. did not meet her annual IEP goals from 2016 to 2020. The panel held that the progress was *de minimis* and that the level of progress was "predictable" and "strong evidence" that the school district denied A.J.T. a FAPE.

   c. The panel found that "toileting ability" is "essential" for A.J.T. to live a "healthy and dignified life" and that the District "remov[ing] her toileting goal for lack of time in the short day" for a period violated its obligation to provide a FAPE.

d. The panel held that the school district denying the evening instruction was a "purely administrative decision" and that "its choice to prioritize its administrative concerns had a negative impact on A.J.T.'s learning." The panel further held that A.J.T. "would have made more progress with evening instruction."

4. Section 504 and ADA Case.

a. Eighth Circuit's Holding. The Eighth Circuit panel held that the District could not be held liable for disability discrimination. The Eighth Circuit panel held that the law of the circuit requires plaintiffs to prove that school officials acted with bad faith or gross misjudgment when bringing Section 504 and ADA claims based on educational services for a student with a disability. The panel held that A.J.T. had failed to make such a showing. The school district met with the parents, updated A.J.T.'s IEP each year, provided the student a "variety of services" including intensive one-on-one instruction, extended A.J.T.'s school day so that she could safely leave school, and offered 16 three-hour sessions at home each summer. The panel concluded that, regardless of whether the school district complied with Section 504 and the ADA, the bad faith or gross misjudgment standard was not met. The entire Eighth Circuit declined to review the decision or, in other words, declined *en banc* review.

b. Nicole Reaves for the U.S., as Amicus Curiae. "[O]ne thing I would just point out is . . . just because after-hours education is required under the IDEA does not mean that that's a required reasonable accommodation under Title II and Section 504." *See* U.S. Tr., Ct Dkt. No. 24-249 (Oral Arg. Apr. 28, 2025), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2024/24-249_4fci.pdf.

c. Supreme Court's Holding. In a "narrow" holding that did not address whether the District engaged in discrimination, the Court held—in agreement with both parties—that ADA and Section 504 disability discrimination "claims based on educational services should be subject to the same standards that apply in other disability discrimination contexts." The Court declined to make holdings on other issues, such as what the particular intent standard is for such claims. A two-Justice concurring opinion, however, noted that the District's undecided arguments on the particular

intent standard "may have a point" and that in a future case those Justices "would be willing to address" the "important" and "serious arguments" raised by the District. The concurrence further instructed the lower courts to "carefully consider whether the existing standards comport with the Constitution and the underlying statutory text."

d. Note. The Eighth Circuit Court of Appeals has since adopted the "deliberate indifference" standard for Section 504 and ADA claims challenging the provision of IDEA services