Dissecting Recent Special Education Cases from the Eighth Circuit: Lessons for School Administrators

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I have provided you several recent cases decided by the United States Court of Appeals for the Eighth Circuit, the federal appellate court covering the state of Iowa. They are presented in chronological order. Each of these cases has the case citation, a link to the decision on the Eighth Circuit's web page, 2-3 quotes from the decision, and a text box on take-away lessons for administrators.

I have omitted cases that are purely of interest to lawyers (e.g., exhaustion of administrative remedies, attorney fees) or are decided based on state law from other states. I have also omitted discussion of issues that are purely legal (e.g., error preservation, venue, compliance with court rules) from the cases I have included. Please feel free to use this outline in individual or group professional development, or in learning opportunities for parents and community. If you have questions, please contact me at thomas.mayes@iowa.gov or 515-242-5614.

I. *Lathrop R-II Sch. Dist. v. Gray*, 611 F.3d 419 (8th Cir. 2010)
Opinion: http://www.ca8.uscourts.gov/opndir/10/07/093428P.pdf

"Baseline data"? "Gray first argues, as the administrative panel concluded, that D.G.'s 2002 and 2003 IEPs were procedurally flawed because they lacked 'baseline data.' The IDEA does not explicitly mandate such specific data, however. What it does require is 'a statement of the child's present levels of educational performance," including 'how the child's disability affects the child's involvement and progress in the general curriculum[,]' and 'a statement of measurable annual goals, including benchmarks or short-term objectives[.]' 20 U.S.C. § 1414(d)(1)(A)."

Planning for Challenging Behavior. "The panel also decided that the IEPs insufficiently addressed D.G.'s behaviors which did not improve. Since D.G.'s IEPs did contain detailed behavioral interventions, and the IDEA does not require behavioral improvement, the panel erred in basing its conclusion on behavioral deficiencies."

Key Points:

1. **The IDEA does not guarantee results; however, it guarantees that a team of thoughtful individuals design reasonable strategies and take reasonable efforts to address data-indicated needs.**
2. **Do not confuse educational jargon with the law's terms.**

II. *C.B. v. Special Sch. Dist.*, 636 F.3d 981 (8th Cir. 2011)
Opinion: http://www.ca8.uscourts.gov/opndir/11/04/093104P.pdf

Reasonably Calculated Goals? "The hearing officer recognized the 'very minimal' standard against which the District's performance was measured under *Rowley*, but nonetheless concluded that C.B. showed by a preponderance of the evidence that the District did not fashion an IEP that was reasonably calculated to provide some educational benefit. The hearing officer found that '[y]ear after year, the School District set trifling goals for the Student and failed to help him achieve even those insignificant goals.' The record supports this conclusion."

"There may be instances in which an educational program that results in such slight progress is sufficient to comply with the statute in light of the student's disability, but this is not such a case. C.B.'s intellectual ability consistently measured in the average range, and evaluations concluded that he was socialized, well behaved, and persistent when confronted with difficult tasks. … During the summer between the third and fourth grades, after working with a teacher for only nine hours with a new teaching method, C.B.'s reading scores improved significantly. Yet despite C.B.'s average intellectual ability, positive attitude, and willingness to work, the School District's educational program was not reasonably calculated to assist C.B. in making progress in reading during fourth and fifth grade."

In a tuition reimbursement case, must the parent's placement satisfy the IDEA's LRE requirement? According to the *C.B.* court, no. "We thus join the Third and Sixth Circuits in concluding that a private placement need not satisfy a least-restrictive environment requirement to be 'proper' under the Act."

The *C.B.* court rejected the "we're nice people" defense. "We have no reason to quarrel with the hearing officer's observation that the staff of the School District 'genuinely wanted to help the Student progress,' but the record also supports the conclusion that the District failed to satisfy the substantive requirements of the IDEA."

Key Points:

1. **If a school's program does not address lack of progress in goals, it is hard to consider the program to be reasonably calculated to confer benefit."**
2. **Watch out for the red flag of "goal not attained, repeat goal," especially if there are no instructional changes.**
3. **In tuition reimbursement cases, parents are not held to LRE requirements.**
4. **Good intentions are not enough. Intention must be demonstrated by action.**
5. **How much tuition was at issue? Once you know, is this a battle you would have fought? Does knowledge of the amount change your calculation?**

III. *Fort Osage R-1 Sch Dist. v. Sims*, 641 F.3d 996 (8th Cir. 2011)
Opinion: http://www.ca8.uscourts.gov/opndir/11/06/103419P.pdf

Failure to identify a "label" of autism? "Consequently, while the IDEA intends that IEPs contain accurate disability diagnoses, we will not automatically set aside an IEP for failing to include a specific disability diagnosis or containing an incorrect diagnosis. *See generally* 20 U.S.C. § 1414(d) (stating the general requirements of an IEP). Instead, as with any other purported

procedural defect, the party challenging the IEP must show that the failure to include a proper disability diagnosis 'compromised the pupil's right to an appropriate education, seriously hampered the parents' opportunity to participate in the formulation process, or caused a deprivation of educational benefits.'" [citing *Lathrop*]

The parents' "predetermination" claim fails. "In this case, the district court made an express finding that the School District was willing to listen to the Sims's evidence and concerns and work with them when drafting all of B.S.'s IEPs…. The district court further found that the School District provided all material information to the Sims regarding B.S. The district court's factual findings are not clearly erroneous because the record contains substantial support for each finding. For example, the record reveals that the School District consistently considered the Sims's outside medical evidence, ordered further testing based upon that evidence, and drafted each of the IEPs to reflect and at least partially incorporate the evidence and the Sims's concerns."

Required by law vs. "best practice" or "best outcomes." Courts "must be careful not to require more from an IEP because the "IDEA does not require that a school either maximize a student's potential or provide the best possible education at public expense." (citing *Fort Zumwalt Sch. Dist. v. Clynes*, 119 F.3d 607, 612 (8th Cir. 1997)).

Key Points:

1. **A "label" is only required if the label itself is necessary for a FAPE.**
2. **While schools and AEAs are not bound by parent demands, they must give parent demands respectful and careful consideration.**
3. **The standard is "appropriate," not "best" or "maximum."**

IV. *K.E. v. Independent Sch. Dist.*, 647 F.3d 795 (8th Cir. 2011)
Opinion: http://www.ca8.uscourts.gov/opndir/11/08/102176P.pdf

"Consideration" of outside providers. "It is true that the District did not incorporate into K.E.'s IEPs all of the recommendations that Dr.'s Miller and Ziegler offered in their respective evaluations. But the IDEA requires only that an IEP team "consider," not "incorporate," such evaluations when developing an IEP, *see* 20 U.S.C. § 1414(d)(3)(A)(iii), and the record shows that the District satisfied that requirement here."

Strong words for a non-participating parent. "The record is clear in this case that it was Parent, not the District, who refused to participate in the IEP process, and thus any failure to engage in a more 'open discussion' about Dr. Unal's evaluation and recommendations belongs with Parent, and Parent alone."

The *K.E.* court reiterated the "snapshot rule." "For those reasons, while we may agree with K.E. that additional services and adaptations may well be warranted now in light of the information that Dr. Unal has provided, it would be improper for us to judge K.E.'s IEPs in hindsight."

Failure to Meet Goals ≠ Inappropriate IEP. "We acknowledge that K.E. did fail to meet some of her IEP goals during the relevant time period. We also recognize that K.E.'s test results do not

demonstrate the level of growth that is typical for children of her grade level. But these shortcomings do not in any way negate the substantial progress that she was able to achieve, and furthermore, we have held that an IEP 'need not be designed to maximize a student's potential commensurate with the opportunity provided to other children.'"

Adequacy of IEP regarding behavior/mental health. "Rather, we agree with the district court that '[d]espite the severity of her mental illness and the changes in her medical treatment, K.E. made progress with respect to reading, spelling, and math, received passing grades in her classes, advanced from grade to grade, and demonstrated growth on standardized tests' during the time period when the ALJ had concluded that she was denied a FAPE. And for those reasons, we reject K.E.'s assertion that her behavioral problems were not sufficiently controlled and prohibited her from receiving a FAPE."

Key Points:

1. **While schools and AEAs are not bound by outside expert reports, they must give those reports respectful and careful consideration.**
2. **The reasonableness of an IEP is judged based on the information available and considered when it is written – not based on after-the-fact information.**
3. **Failure to meet goals, while concerning, does not automatically equal an IDEA violation.**
4. **Avoid falling into the trap of the false dichotomy between "education" and "mental health." Mental health is an education issue; however, the standard is accessing an appropriate public education, not the elimination of mental health difficulties or symptoms.**

V. *Barron v. South Dakota Bd. of Regents*, 655 F.3d 787 (8th Cir. 2011)
Opinion: http://media.ca8.uscourts.gov/opndir/11/09/103426P.pdf

Closure of State School Did not Violate the IDEA. The court concluded that deaf children could receive a FAPE in the absence of the state school.

> The parents contend that there exists a genuine issue of material fact whether a free appropriate public education could be offered in the absence of a school for the deaf. The parents have not alleged that their children are not "benefit[ting] educationally" in the programs and schools in which they are currently enrolled. *See [Rowley]*. The complaint explains that the students would prefer to attend programs at the school's campus and that the parents would prefer to enroll their children in a separate, language-rich school. Although it is arguable that a stand-alone school for the deaf might provide the best education for their children, the state is not required to make available the "best possible option." [CITATION OMITTED] Thus the parents have failed to allege facts to support their claim that the school's discontinuation of educational programs at the Sioux Falls campus violated the IDEA.

LRE For Students Who Are Deaf. While noting the advocacy positions on this issue, the court stated: "The IDEA's integrated-classroom preference makes no exception for deaf students."

Key Points:

1. **While parent and student "preferences" are to be considered, they are not binding.**
2. **There are no labels, conditions, or diagnoses that are exempt from the IDEA's requirements.**

VI. *Park Hill Sch. Dist. v. Dass*, 655 F.3d 762 (8th Cir. 2011)
Opinion: http://www.ca8.uscourts.gov/opndir/11/09/102187P.pdf

When are transition plans and behavior intervention plans required? Despite concluding that the District's autism program was substantively appropriate, the Panels held that the Parents were entitled to reimbursement because the lack of transition strategies and a behavior intervention plan in the 2005 IEPs deprived D.D. and K.D. of a FAPE. We disagree. The IDEA only *requires* that an IEP include "transition services" and a "behavioral intervention plan" in limited circumstances not present in this case. *See* 20 U.S.C. §§ 1414(d)(1)(A)(i)(VIII), 1415(k)(1)(F); 34 C.F.R. §§ 300.320(b), .324(a)(2)(i). Otherwise, § 1414(d)(3) requires only that, if the child's behavior impedes learning, the IEP team must "consider" the use of behavior interventions and other strategies. *See Robert B. ex rel. Bruce B. v. W. Chester Area Sch. Dist.*, No. 04-CV-2069, 2005 WL 2396968, at *8 (E.D. Pa. Sept. 27, 2005).

The absence of a transition plan and behavior intervention plan did not deny a FAPE. "The absence of IEP provisions addressing transition and behavior issues does not, standing alone, violate the IDEA or deprive the disabled child of a FAPE."

Key Points:

1. **While transition plans and behavior plans may be good educational practice, the law requires them only in certain circumstances.**
2. **When the law does not require a transition plan or behavior plan, a parent who wants such a plan must prove the child will receive no educational benefit without such a plan.**

VII. *T.B. v. St. Joseph Sch. Dist.*, 677 F.3d 844 (8th Cir. 2012)
Opinion: http://www.ca8.uscourts.gov/opndir/12/04/112168P.pdf

When is a parent's private placement "proper"? The parents requested reimbursement for a private in-home program, which the hearing panel denied. The hearing panel described in the in-home program, provided pursuant to an HCBS waiver, as "woefully inadequate" in part because "'an academic component was glaringly absent' as demonstrated by the lack of any record indicating T.B.'s current cognitive skills, his grade level, or his reading and math levels." The Eighth Circuit agreed:

> To be sure, the record does indicate the program provided some educational services, including math, reading, and listening comprehension. These educational services, however, were often secondary to the teaching of social and behavior skills…. Thus, while the home-based program may have offered some activities to help supplement T.B.'s educational needs, these activities were in no way intended to supplant the educational services available to him through the School District.

The Eighth Circuit affirmed the order denying tuition reimbursement.

Key Points:

1. **For a parent placement to be proper under tuition reimbursement analysis, it must address the child's educational needs.**
2. **Any program, whether school-created or parent-chosen, that focuses on only one aspect when a child presents multiple needs should be viewed with skepticism.**

VIII. *M.M. v. District 0001 Lancaster County Sch.*, 702 F.3d 479 (8th Cir. 2012)
Opinion: http://www.ca8.uscourts.gov/opndir/12/12/113774P.pdf

Failure to Attain Goals? Was FAPE denied because L.M. did not attain goals (in the words of the case, "meet his third grade math requirements" and a "significant decline" in reading scores). The court held that, notwithstanding L.M.'s failure to meet goals, L.M.'s team acted reasonably, L.M. was showing growth, and L.M. had received educational benefit.

Choice of Methodology? The second issue concerned behavioral techniques, and a dispute between physical restraint (parents' preference) and physical confinement and detention (IEP team decision). The parents' experts opined that seclusion caused the child's behaviors; consequently, the parents argued that any IEP that included seclusion denied a FAPE. The courts did not accept that argument. First, the courts concluded that the team must "consider" outside opinions, but are not bound by them. Second, the courts concluded that the team made a reasoned judgment between two techniques. According to the Eighth Circuit,

> The District maintained the ability to use the calming room based on its past experience with L.M., concern for the safety of students and staff, and perceived differences between KKI and the public school setting. District personnel had increased the use of the calming room before L.M. had gone to KKI, and they believed that it had helped to reduce his problem behaviors at school. District behavior specialist Rauner explained that she noticed that when district personnel "intervened and used the [calming] room … then it was longer before another behavior occurred." Rauner also stated that the District preferred the calming room because it avoided "injuries to staff or to students" which could occur by physically restraining a child. District personnel also believed that it was inappropriate to compare L.M.'s behavior at KKI with his likely behavior at Sheridan because KKI was in a hospital setting, and L.M. had been on different medications while he was there. The evidence showed that the District adequately considered positive behavioral interventions and strategies and chose an appropriate behavior intervention plan for L.M.

Key Points:

1. **Failure to attain goals, standing alone, is not an IDEA violation (see above).**
2. **If competing methodologies offer educational benefit, the public agency may select methodology.**