

Free Appropriate Public Education from Rowley to Endrew: Implications for Special Education Teachers & Administrators

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What We Will Do this Afternoon

- Explain FAPE and why it is so important
- Review the Supreme Court’s decision in Rowley
- Look at the split in the circuit courts that led to Endrew F.
- Examine the decision in Endrew, the major takeaways of the decision, and how the ruling will effect special educators
- Address the new FAPE issue: IEP implementation
- Describe the procedural and substantive requirements of the IDEA, in light of Rowley and Endrew



Judicial Circuits

Geographic Boundaries
of United States Courts of Appeals and United States District Courts




The Primary Requirement of the IDEA and the crucial obligation to special education is to provide a special education that confers a free appropriate public education (FAPE)



FAPE issues account for 85% to 90% of all special education litigation

Gerl, 2014



Free Appropriate Public Education (FAPE)

- Special education & related services that are:
 - Provided at public expense
 - Meet the standards of the SEA
 - Includes preschool, elementary, or secondary education
 - Are provided in conformity with the individualized education program (IEP)

IDEA, 20 U.S.C. § 1401 (A)(18)



Board of Education v. Rowley, 1982



• 458 U.S. 176 (1982)



Maximization of Benefit

The requirement that States provide "equal" educational opportunities would thus seem to **present an entirely unworkable standard** requiring impossible measurements and comparisons.... To require the furnishing of every special service necessary to maximize each handicapped child's potential is, we think, further than Congress intended to go (Rowley, p. 186).



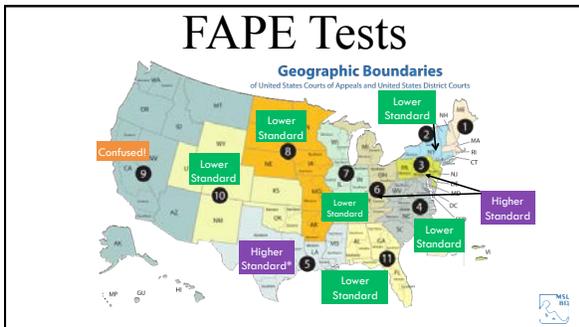
Board of Education v. Rowley, 1982

"We therefore conclude that the **'basic floor of opportunity'** consists of access to specialized instruction and related services which are **individually designed** to provide **educational benefit** to the handicapped child."



The Rowley Two-Part Test

1. Has the state complied with the **procedures** set forth in the law?
2. Is the resulting IEP reasonably calculated to enable the student to receive **educational benefit**?



The Tenth Circuit's Educational Benefit Standard

Andrew F. v. Douglas County School District R1, 798 F.3d 1329, (10th Cir. 2014)



Facts of the Case

- Andrew F. (Drew) was diagnosed with autism and attention deficit hyperactivity disorder at age two.
- He received special education services in the Douglas County Schools through 4th grade.
- Drew's parents rejected an IEP proposed by the school district.
- Drew's parents enrolled him at a private school, the Firefly Autism House.
- They requested that Douglas County Schools reimburse them for tuition and related expenses.



The Hearing & District Court Case

- Drew's parents contended the school had denied him a FAPE.
- The administrative law judge (ALJ) denied the request, finding the school district had provided Drew with a FAPE.
- The parents filed suit in the U.S. District Court for the District of Colorado. The judge affirmed the ALJ's decision.
- The parents filed an appeal with the U.S. Circuit Court of Appeals in the 10th Circuit.



Appeal to the 10th Circuit

- Drew's parents contended they were entitled to tuition reimbursement because the ALJ and Federal District court failed to recognize the District's procedural and substantive violations of the IDEA.
- The court noted the two conditions under which tuition reimbursement is available under the IDEA.
- Of the two, the Court only addressed whether the District had violated FAPE by failing to provide Drew with a FAPE.



The Parents Challenge

- **Procedural deficiencies**
 - The District failed to provide adequate reporting on Drew's progress.
 - The District failed to properly assess Drew's behavior and did not include an adequate plan to address behavior problems (no FBA).
- **Substantive deficiencies**
 - Drew made no measurable progress on his goals.
 - District failed to address Drew's escalating behavioral problems.



The 10th Circuit's Decision

- **Procedural deficiencies**
 - Even though the district admitted to not reporting Drew's progress, and the court "did not endorse the District's reporting," the parents still participated in a meaningful way in crafting his IEP.
 - Because the district "considered" Drew's behavior and possible interventions, it met the requirements of the IDEA.
 - An FBA is only required when there is a disciplinary change of placement.



The 10th Circuit's Decision

- **Substantive deficiencies**
 - Although Drew's progress was not measured, the ALJ decided he had made progress in the past so he had made some educational progress during his time in the district, and some educational progress was sufficient.
 - Many of Drew's goals remained the same from year to year but sometimes they were changed.
 - The district has made sufficient effort to craft a behavioral plan so it did not deny FAPE.



The Tenth Circuit’s Educational Benefit Standard

“The educational benefit mandated by the IDEA must merely be more than de minimis”



Appeal to the U.S. Supreme Court

• On December 22, 2015 the parents appealed to the U.S. Supreme Court

• **Question Presented:** What is the level of educational benefit school districts must confer on children with disabilities to provide them with the free appropriate public education guaranteed by the Individuals with Disabilities Education Act?

Certiorari Granted on September 29, 2016



Oral Arguments: January 11, 2017



Oral Arguments: January 11, 2017



“A standard with a bite!”



“How is de minimis benefit, progress?”



"IDEA provides a clear standard. The problem is coming up with the right words."




Supreme Court Ruling: March 22, 2017



In *Rowley*, "we declined...to endorse any one standard for determining when (students with disabilities) are receiving sufficient educational benefit to satisfy the requirements of the Act."

"That more difficult problem is before us today."



Supreme Court Ruling: March 22, 2017

- The High Court rejected the "merely more than *de minimis*" standard, vacating the decision and remanding the case back to the 10th Circuit to apply the new standard.
- "To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make **progress appropriate** in light of the child's circumstances."



Endrew Takeaway #1

The Supreme Court **rejected** the "***de minimis***" or "trivial" educational benefit standard



The Demise of *De Minimis*

"A student offered an educational program providing 'merely more than de minimis' progress from year to year can hardly be said to have been offered an education at all."



"A substantive standard not focused on student progress would do little to remedy the pervasive and tragic academic stagnation that prompted Congress to act.... The IDEA demands more."



The Demise of *De Minimis*

"But whatever else can be said about it, this standard is markedly more demanding than the 'merely more than de minimis' test applied by the Tenth Circuit."



"A child's education program must be appropriately ambitious in light of his circumstances...." "Every child should have the chance to meet challenging objectives."



Endrew Takeaway #2

The Supreme Court **rejected** the maximizing standard the Court previously rejected in *Rowley*



Maximization of Benefit

Justice Roberts noted that the *Rowley* Court rejected a FAPE standard that required students with disabilities to achieve academic success that was substantially equal to the opportunity afforded children without disabilities



Maximization of Benefit

“Mindful that Congress (despite several intervening amendments to the IDEA) has not materially changed the statutory definition of a FAPE since *Rowley* was decided, we decline to interpret the FAPE provision in a manner so plainly at odds with the Court’s analysis in that case.”
(*Endrew*, p. 15)



Endrew Takeaway #3

The *Endrew F.* decision did not replace or overturn the *Rowley* decision; rather, it **clarified** its FAPE standard



The *Rowley/Endrew* Test

1. In the development of an IEP, has the school agency complied with the procedures set forth in the IDEA?
2. Is the IEP developed through the IDEA’s procedures reasonably calculated to enable the child to make progress that is appropriate in light of his or her circumstances?



Endrew Takeaway #4

The full implications of the *Endrew* decision will not become clear until hearing officers and judges apply the *Endrew* standard to the facts presented in future FAPE litigation



The Role of the Courts

“A standard not a formula”

“We will not attempt to elaborate on what appropriate progress will look like from case to case.... The adequacy of a given IEP turns on the **unique circumstances of the (student) for whom it was created.**”



The Role of the Courts

“A reviewing court may fairly expect those authorities to be able to offer a cogent and responsive explanation for their decisions that shows **the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances.**”



The Role of the Courts

“any review of an IEP must appreciate that the question is whether the IEP is **reasonable**, not whether the court regards it as ideal.”



Endrew Takeaway #5

The *Endrew* decision provides guidance to special education administrators and teachers in developing IEPs that meet the *Endrew* standard.



Endrew on the IEP

- “An IEP is not a form document.”
- “The IEP must aim to enable the child to **make progress.**”
- It is through the IEP that a free appropriate public education is tailored to the unique needs of the (student).”



A focus on the particular child is at the core of the IDEA. The instruction offered must be “specially designed” to meet a child’s “unique needs” through an “individualized education program.” An IEP is constructed only after careful consideration of the child’s present levels of achievement, disability, and **potential for growth**



Recommendation #1

Continue to train IEP teams to avoid procedural violations in the development of the IEP that could, in and of themselves, constitute a denial of FAPE.



Andrew on the Importance of Parental Participation

- An IEP must be drafted in compliance with a detailed set of procedures that “emphasize collaboration among parents and educators and require careful consideration of the child’s individual circumstances”
- “this fact-intensive exercise (IEP development) will be informed not only by the expertise of school officials, but also by the input of the child’s parents”
- “judicial deference to school authorities will depend on their having provided parents in the IEP process with the opportunity to “fully air their ... opinion on the requisite degree of progress”



Recommendation #2

When developing the content of a student’s IEP and subsequently reviewing and revising it, be sure that the present levels of performance and annual goals are based upon evaluations and other relevant data that are current.



Recommendation #3

Ensure that annual IEP goals are **Challenging, ambitious, and measurable.**



“Appropriate Progress in Light of the Child’s Circumstances”



Recommendation #4

Continuously **monitor and measure** a child’s progress on annual goals (and objectives/benchmarks, if applicable) and maintain specific data to demonstrate that progress has been made.



Recommendation #5

When progress report and other data do not reflect that an annual goal will be met, reconvene the IEP team to determine why, make needed instructional changes, and continue to collect data



“A substantive standard not focused on student progress would do little to remedy the pervasive and tragic academic stagnation that prompted Congress to act”



Read More About the Case



The Two Dimensions of FAPE: Procedural & Substantive



The Rowley/Endrew Test

1. In the development of an IEP, has the school agency complied with the procedures set forth in the IDEA?
2. Is the IEP developed through the IDEA's procedures reasonably calculated to enable the child to make progress in light of his or her circumstances?



The Third Dimension of FAPE? Failure to Implement the IEP



Implementation Dimension

- In failure to implement cases, parents have asserted that a school district has denied FAPE, based on the claim that the school district failed to partially or fully implement their child's IEP.
- Three approaches to failure to implement the IEP have evolved (Bateman, 2017; King, 2007; Zirkel & Bauer, 2016).



Materiality-Alone Approach

- *Van Duyn v. Baker School District 5J*, 502 F.3d 811 (2007)
 - 'We hold that a **material** failure to implement an IEP violates the IDEA.'
 - "A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child's IEP. . ."
 - "[W]e clarify that the materiality standard does not require that the child suffer demonstrable educational harm in order to prevail."



Materiality-Benefit Approach

- *Houston Independent School District v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000)
 - Part 1 of M/B test: Did the school district fail to implement substantial or significant provisions of a student's IEP?
 - Part 2 of M/B test: Did the student receive educational benefit?



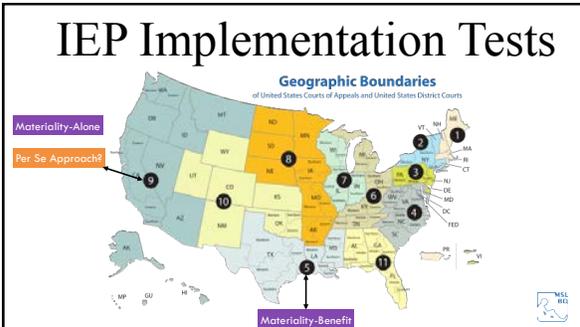
Dissent in *Van Duyn*

Judges are ***not in a position*** to determine which parts of an agreed-upon IEP are or are not material. ***The IEP Team***, consisting of experts, teachers, parents, and the student, is ***the entity equipped to determine the needs of a special education student***, and the IEP represents this determination. Although judicial review of the content of an IEP is appropriate when the student or the student's parents challenge the sufficiency of the IEP . . . ***such review is not appropriate where, as here, all parties have agreed that the content of the IEP provides FAPE.***



Support for the Per Se Approach

- *M.C. v. Antelope Valley Union High School District*, 852 F.3d 840 (9th Cir. 2017).
 - "An IEP is a contract. It is signed by the child's parents and the school's representatives, and thus embodies a binding commitment" (P. 848).
 - Because the IEP is a contract, any deviation from it is an automatic denial of FAPE based on any proven lack of complete implementation of IEP provisions

What do these requirements mean for special education teachers and administrators?



Procedural Requirements

- These safeguards are designed to protect the rights of parents and their child with a disability by requiring the school district take actions to involve parents in the special education process
- Procedures requirements represent the “how” and “when” of the IDEA
- Has the school district complied with the procedures set forth in the law? (*Board of Education v. Rowley*, 1982)



“A decision made by a hearing officer shall be made on *substantive* grounds based on a determination of whether a child received a free appropriate public education”
(IDEA, 20 U.S.C.§1415(f)(3)(E)(I))



What Does This Mean?

- Procedural requirements are important and must be followed, however, failure to do so will not always result in a finding against a school district.
- Procedural violations will only result in a ruling that FAPE was denied if:
 - The violations impeded a student’s right to FAPE
 - Caused a deprivation of educational benefits
 - Significantly impeded parents’ rights to participate



Critical Procedural Requirements

- Prior written notice
- Informed parental consent
- Ensuring parents meaningful involvement
- Don’t engage in predetermination
- Fielding an appropriate IEP team
- Determining a student’s placement only after his/her program is developed
- Place a student in the least restrictive environment appropriate for their needs
- Consider the five special factors regardless of a student’s disability (especially behavior)



Substantive Requirements

- The substantive requirements of IDEA refer to a school districts obligation to provide a FAPE that designed to lead to student progress.
- Substantive requirements represent the “what” of the IDEA
- Is a student’s IEP “reasonably calculated to enable the child to make **progress** appropriate in light of his circumstances.” (*Endrew F. v. Douglas County School District* (2017)).



Critical Substantive Requirements

- Conduct a current, relevant and meaningful assessment that addresses all of a student's needs
- Develop the present levels of academic achievement and functional performance statements based on current and thorough assessments
- Write ambitious goals that are measurable and describe how and when they will be measured
- Develop educationally meaningful services that all student needs
- Connect PLAAPF statements, to goals, to services
- Monitor student progress by collecting "real" data
- Determining a student's placement only after his/her program is developed



Implementation Requirements

- The implication requirements of IDEA refer to a school districts obligation to implement the IEP as developed by school-based personnel in collaboration with their parents.
- Implementation requirements represent a school districts faithfulness in implementing a student's IEP
- An IEP is a **contract**. It is signed by the child's parents and the school's representatives, and thus embodies a binding commitment" (*M.C. v. Antelope Valley School District*, 2017)



The Requirement to Implement

- The IDEA defines FAPE as the special education and related services that "are provided in conformity with the [IEP]" (§ 1402[9][D]).
- Because the IEP is the blueprint of a student's FAPE, all aspects of the document must be implemented as agreed upon.
- Develop a user-friendly way of communicating with general education teachers, related service providers, and special education teachers regarding their responsibilities under the IEP



The IEP: Where the Rubber Meets the Road!!



The Role of the IEP

"The IEP is the central part of this Act as we wrote it and intended it to be carried out."

Senator Robert T. Stafford, 1978



"An IEP must aim to enable the child to make progress; the essential function of an IEP is to set out a plan for pursuing academic and functional advancement"

(*Andrew F. v. Douglas County School District*, 2017)



The Promise of the IEP

- The IEP is the instrument developed to ensure FAPE
 - The IEP must be developed in accordance with the IDEA's procedural requirements
 - The IEP must be reasonably calculated to allow a student to make education progress
 - The IEP must be faithfully implemented
- The IEP is similar to a contractual obligation
 - LEA promises, in writing to provide certain services & good faith efforts, but it is not a guarantee of success



Conclusion

- Rowley requires that we know and adhere to the procedures of the IDEA
- Endrew requires that we develop IEPs that are calculated to enable to student to progress in light of his or her capabilities
- The IDEA requires that we consider the IEP a contract and implement it as agreed upon.



Thank you!!!!

